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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

Brian Goodine,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Peter Rodway
William Savage
Rodway & Horodyski
P.O. Box 874
Portland, ME 04104

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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QUESTION PRESENTED

Under 21 U.S.C. 841, is drug quantity an element of the offense or instead a sentencing factor?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Goodine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-15a) is published at 326 F.3d 26. The district court's order sentencing petitioner (Pet. App. 16a-21a) is unpublished.

RELEVANT STATUTORY PROVISION

21 U.S.C. 841 is reproduced in relevant part in the court of appeals' opinion (at 9a-10a n.4).

JURISDICTION

The First Circuit entered its opinion on April 9, 2003, and denied rehearing and rehearing en banc on May 19, 2003 (Pet. App. 22a). Justice Souter subsequently extended the time to file this petition to and including October 16, 2003. App. No. 03-117. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

This case raises a critical issue, on which the circuits are avowedly split, regarding the single most frequently utilized provision of federal criminal law. The provisions of the principal federal drug statute – 21 U.S.C. 841 ("Section 841") – are defined based on drug quantity and type. The courts of appeals are intractably divided over whether drug quantity is an element of the offense that must be found by the jury beyond a reasonable doubt or instead a sentencing factor that the judge may determine based on a preponderance of the evidence. "[M]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment,

submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones* v. *United States*, 526 U.S. 227, 232 (1999). The current inconsistent patchwork of lower court rulings produces an intolerable disparity in the treatment of tens of thousands of similarly situated criminal defendants every year.

1. Section 841 makes it unlawful, *inter alia*, to manufacture, distribute, dispense, or possess a controlled substance. 21 U.S.C. 841(a). Subsection (b) of the statute identifies particular controlled substances, quantities of drugs, and resulting punishments. Subsection (b)(1) governs most drugs, including the one at issue in this case, cocaine base. Subsections (b)(1)(A), (B), and (C) address progressively smaller drug quantities and impose progressively smaller sentencing ranges.

2. A federal jury convicted petitioner Brian Goodine on two counts of possessing and conspiring to possess cocaine base in violation of Section 841. The jury returned a special verdict form specifically finding that petitioner was responsible for between five and fifty grams of cocaine base, rejecting a finding of responsibility for over fifty grams. For this quantity, given petitioner's prior criminal history, subsection (b)(1)(B) subjected him to a term of imprisonment of ten years to life, a term exceeding the applicable Sentencing Guidelines range. Thus, exactly ten years was the only possible sentence "[s]trictly following the jury's conviction" (Pet. App. 3a); a sentence above ten years would have been barred by the Guidelines, from which the court could only depart as necessary to comply with the statutory minimum.

Over petitioner's timely objection, however, the district court disregarded the jury's drug quantity finding – *viz.*, that petitioner had been responsible for less than fifty grams – and refused to sentence petitioner under subsection (b)(1)(B) consistent with the verdict. Instead, it found by a preponderance of the evidence that petitioner was responsible

for more than 300 grams of cocaine base. On this finding, subsection (b)(1)(A) subjected petitioner to a term of imprisonment of twenty years to life. The district court imposed the mandatory minimum term of twenty years, which was 120 months greater than the sentence of ten years months that could have been imposed pursuant to the jury's contrary finding of drug quantity.

3. Petitioner appealed, arguing that the district court was required to sentence him based on the jury's findings. Specifically, petitioner contended that Section 841(b) sets forth elements of the offense rather than sentencing factors. The First Circuit acknowledged the square "split among [its] sister circuits" on the question, Pet. App. 5a, and joined those circuits holding that the statute merely establishes sentencing factors, which the judge may find based on a preponderance of the evidence. *Id.* 9a-13a.

According to the First Circuit, drug quantity is a "classic sentencing factor" (Pet. App. 11a) and, under Section 841 in particular, "goes to how the offense is conducted" but is "not necessary to the determination of whether [the] defendant's conduct is criminal or innocent" (*id.* 12a). Textually, the court reasoned that the statute's structure and its headings indicate that "part (a) identifies a crime and part (b) outlines different penalties for that crime." *Id.* 11a. Although the court opined that the "legislative history on this point is scarce, and others have found it unhelpful," it nonetheless relied on a single passage in a congressional report broadly describing "'sentencing procedures' as giving 'maximum flexibility to judges.'" *Id.*

After the court of appeals denied rehearing and rehearing en banc, this petition followed.

REASONS FOR GRANTING THE WRIT

The First Circuit properly recognized the "split among [its] sister circuits" over whether Section 841(b) makes drug quantity an element of the offense or instead a sentencing

factor. Pet. App. 5a. The courts of appeals have adopted three approaches. The D.C. and Ninth Circuits apply a rule under which petitioner unquestionably would have prevailed: they hold that the statute defines drug quantity as an offense element that must always be found by the jury beyond a reasonable doubt. Other circuits, including the First Circuit below, hold that the statute defines quantity in all cases as a sentencing factor that the judge may determine by a preponderance of the evidence. These circuits hold that the only restriction on the district court's ability to make its own findings and impose a sentence accordingly is the *constitutional* rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), that the court may not impose a sentence that exceeds the statutory maximum under the jury's findings. Still other circuits reach essentially the same result by holding, as a matter of statutory interpretation, that Section 841(b) makes drug quantity an element only in those cases in which the Constitution would require a jury finding in any event – *i.e.*, in cases implicating the *Apprendi* rule.

Certiorari is warranted to resolve this conflict, which is of indisputable importance. Tens of thousands of individuals are charged under Section 841 each year. The inconsistent treatment of these defendants is intolerable. Deferring resolution of the circuit split until a later date would invite the chaos of innumerable collateral attacks to Section 841 convictions. This is furthermore an ideal vehicle in which to resolve the conflict, because it is outcome-determinative here and because petitioner properly preserved his objection that he must be sentenced under subsection (b)(1)(B) based on the jury's findings.

I. The Circuits Are Split Over Whether Section 841(b) Defines Drug Quantity As An Element Of The Offense Or Instead As A Sentencing Factor.

1. Petitioner would have prevailed in the D.C. and Ninth Circuits. In *United States* v. *Graham*, 317 F.3d 262 (2003) (Randolph, Rogers, & Williams, JJ.), the D.C. Circuit,

applying its settled rule that Section 841(b) sets forth offense elements, invalidated the part of the defendant's sentence that was inconsistent with the jury's verdict. Notwithstanding that the issue of drug quantity had never been submitted to the jury, the district judge had found Graham responsible for five or more grams of cocaine base, and accordingly had sentenced him under Section 841(b)(1)(B), which imposed a mandatory term of five years of supervised release. If Graham had been sentenced for an unspecified quantity pursuant to Section 841(b)(1)(C), by contrast, he would have been subject to a mandatory minimum of just three years' supervised release.

The D.C. Circuit first held that the supervised release component of Graham's sentence did not violate *Apprendi*'s constitutional rule, because it did not exceed the statutory maximum that could have been imposed based on the jury's finding that Graham was responsible for an unspecified drug quantity. 314 F.3d at 273-74. But it nonetheless ruled for Graham, finding that the district court's ruling constituted plain error because the sentence violated the *statute*:

> [T]he question becomes whether drug quantity is an element of the offense defined in § 841, such that it must be submitted to the jury to be determined beyond a reasonable doubt, and a defendant must be convicted of violating a particular subparagraph of § 841, as argued by Graham. The alternative position * * * is that drug quantity is merely a sentencing factor, to be determined by the district court at sentencing based on a preponderance of the evidence * * *.
>
> * * * [T]his court [has] interpreted § 841 as a tripartite statute establishing three separate offenses, with different maximum sentences based on drug quantity, and not a unitary statute with drug quantity as a sentencing factor. * * * Consequently, in light of [D.C. Circuit precedent], the district court, in sentencing Graham, could not treat subparagraphs (A) and (C) of §

> 841 as mere sentencing factors, and to the extent it did it erred.

317 F.3d at 274-75 (internal citations omitted). The D.C. Circuit furthermore found the error prejudicial and accordingly remanded. "[T]he district court in sentencing Graham appears to have tracked the mandatory minimum sentencing provisions of § 841, and thus may have applied § 841(b) (1)(A), which increased Graham's supervised release period by two years." *Id.* at 275.[1]

The D.C. Circuit in *Graham* thus definitively held that Section 841 makes drug quantity an element that must be submitted to the jury regardless of whether *Apprendi* error is present. This holding rested on the court's settled precedents. In *United States* v. *Webb*, 255 F.3d 890, 896 (2001) (Ginsburg, C.J.; Sentelle & Garland, JJ.), the court confronted "whether § 841 is properly interpreted as a unitary (one crime with a life maximum) or tripartite (three crimes with three increasing maxima) statute." Following a prior D.C. Circuit decision, *United States* v. *Fields*, 242 F.3d 393, *as amended on rh'g*, 251 F.3d 1041 (2001) (Edwards, C.J.; Ginsburg & Tatel, JJ.), the court held that Section 841 was tripartite. *Webb*, 255 F.3d at 896. The court in *Webb* accordingly held that drug "quantities constitute elements of the charged offenses" under subsections (b)(1)(A) and (B), "and by failing to submit them to the jury, the district court erred." *Id.* at 900. But the court held that the district court's error was not reversible under the plain error standard because "the evidence of drug quantity was overwhelming and uncontroverted." *Id.* at 902. See also *United States* v. *Singleton*, 177 F. Supp. 2d 31, 34 (D.D.C. 2001) (In the D.C. Circuit, "courts can no longer treat drug quantity as a

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[1] The D.C. Circuit found that the defendant's term of imprisonment did not require reversal because (unlike in petitioner's case), the prison term imposed fell within the range permitted by the jury's verdict under the statute and the Sentencing Guidelines. See *Graham*, 317 F.3d at 273-74.

sentencing factor because *in a particular case* the judge *could* find by a mere preponderance that a sufficient quantity of drugs was involved to trigger the statutory minimums and maximums set forth in Section 841(b)(1)(A) or (B), thereby resulting in a prison term beyond the 20-year statutory maximum set forth in Section 841(b)(1)(C). The question of drug quantity therefore now is treated as an element of the offense that must be decided by the jury beyond a reasonable doubt." (citing *Webb*, 255 F.3d at 896) (emphases added)).

The Ninth Circuit similarly holds that drug quantity is an element of the offense under Section 841. In *United States* v. *Buckland*, 289 F.3d 558, 564-68 (2002) (en banc), the court so held based on a study of the statutory text, construed in light of the fact that a contrary conclusion could render the statute unconstitutional under *Apprendi* by permitting judges to impose sentences that exceed the otherwise-applicable statutory maximum. The court accordingly overruled its own pre-*Apprendi* holding that drug quantity was a mere sentencing factor, noting that this interpretation had never been based in the statutory text or the legislative history. *Id.* at 565 (finding no "persuasive legislative history that shows Congress clearly intended" quantity findings to be made by sentencing courts). Accordingly,

> Congress and courts may have understood or accepted that, as a matter of procedure, drug quantity could be decided by a judge, not a jury. Such an understanding, however, does not represent the same kind of pellucid legislative purpose and intent found in the New Jersey statute struck down in *Apprendi*. * * * Thus, because our reading of the statute is 'fairly possible,' we are obliged to so construe it.

Id. at 567.

Although *Buckland* concerned a facial challenge to the statute's constitutionality, the Ninth Circuit has subsequently held that failure to submit drug quantity to the jury constitutes reversible error even in cases in which the sentence issued did

not exceed the statutory maximum for an unspecified quantity. See *United States* v. *Velasco-Heredia*, 319 F.3d 1080, 1084-87 (2003) (rejecting as "too clever by half" the government's argument that the error was harmless because the sentence was within the range statutorily authorized by the jury's verdict). In *Velasco-Heredia*, the court held that because the mandatory minimum sentence imposed in that case exceeded the maximum sentence that the court could have imposed, pursuant to the Sentencing Guidelines, for an unspecified quantity, the prejudice to the defendant was obvious: "not only was the error not harmless, it was demonstrably harmful to this defendant." *Id.* at 1086.[2]

Petitioner would accordingly have prevailed in the D.C. and Ninth Circuits. The D.C. Circuit's decision in *Graham*, in particular, is indistinguishable from this case. Both here and in *Graham*, the court sentenced the defendant to a mandatory minimum sentence based on a judicial finding of drug quantity that, although it did not exceed the statutory maximum permissible under the jury's verdict, exceeded the maximum sentence permitted by the jury's verdict. Indeed, the only distinctions make petitioner's case even stronger than Graham's was: here, harmless rather than plain error review applies, since petitioner preserved his objection below; and here, the jury made a specific finding as to drug quantity that was disregarded by the court, obviating the need to inquire as to what the jury would have found had the issue been submitted to it.

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[2] The Eighth Circuit has suggested that it agrees. In *United States* v. *Bradford*, 246 F.3d 1107, 1115 (2001) (per curiam), the court vacated and remanded the sentence of one defendant (Banks), because the district court indicated that (as in petitioner's case) it was applying its own finding of drug quantity to impose a mandatory minimum sentence that exceeded the sentence that would have been imposed if the judge had followed the jury's verdict.

2. By contrast, other courts of appeals agree with the First Circuit's holding in this case. The Seventh and Eleventh Circuits hold that Section 841(b) sets forth sentencing factors, and *never* requires drug quantity to be determined by the jury. See Pet. App. 9a-13a; *United States* v. *Smith*, 308 F.3d 726, 740-41 (CA7 2002); *United States* v. *Sanchez*, 269 F.3d 1250, 1267-70 (CA11 2001). Each of these courts recognizes that, as a matter of federal constitutional law, *Apprendi* forbids the judge from making findings that would result in a sentence exceeding the maximum statutory penalty that could have been imposed based on the facts found by the jury. This limit, in these courts' view, is an "external constitutional restraint" that has no bearing on the proper construction of the statute itself. *Sanchez*, 269 F.3d at 1268 (holding that "*Apprendi* did not announce any new principles of statutory construction").

The Second, Fifth, and Sixth Circuits have adopted a different rationale, but one that ultimately produces the same result. These courts hold that Section 841(b) sets forth elements of the offense. But they inexplicably apply that rule only when the sentence imposed by the judge exceeds the maximum statutory penalty that could be imposed based on the jury's findings and therefore violates *Apprendi*. See *United States* v. *Darwich*, 337 F.3d 645, 655 (CA6 2003); *United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 673 (CA5), cert. denied, 123 S. Ct. 2114 (2003); *United States* v. *Thomas*, 274 F.3d 655, 663-64 (CA2 2001) (en banc). These courts have thus adopted a hybrid statutory interpretation, holding that drug quantity is a mere sentencing factor in cases in which it does not affect the maximum sentence. See, *e.g.*, *United States* v. *King*, No. 02-1460, 2003 U.S. App. LEXIS 19280, at **7-8 (CA2 Sept. 17, 2003) (explicitly rejecting an argument that "drug quantity and type are now elements" in cases not involving an increase in the statutory maximum).

Still other courts have failed to articulate their positions clearly, leaving district courts without any guidance. The Tenth Circuit holds that drug quantity is an element of the

offense, but has not specified whether that holding is limited to cases in which the judge's findings trigger *Apprendi*. See *United States* v. *Cernobyl*, 255 F.3d 1215, 1218 (2001). And the Third and Fourth Circuits have held as a matter of constitutional law that juries must make drug quantity findings when required by *Apprendi*, but they have avoided resolving the statutory construction question presented by this case. See *United States* v. *Vazquez*, 271 F.3d 93, 98 (CA3 2001); *United States* v. *Promise*, 255 F.3d 150, 156-57 (CA4 2001).

Certiorari should be granted to resolve this conflict.

II. The Decision Below Was Erroneous.

Certiorari is also warranted because the First Circuit's decision below is wrong on the merits. The most thorough post-*Apprendi* judicial analysis of the proper construction of Section 841 is that of then-Chief Judge Becker, concurring in *United States* v. *Vazquez*, 271 F.3d 93, 107-16 (CA3 2001). Chief Judge Becker identified several factors that confirm that the statute defines drug quantity as an element of the offense in all cases. First, the text and structure of the statute demonstrate that Section 841(a) alone cannot be viewed as defining a complete crime, because it includes no punishment. Other courts, including the First Circuit in this case, rely on the fact that the *heading* of Section 841(a) addresses "crimes," while that of 841(b) addresses "penalties." *Id.* at 110-11. But these headings were created not by Congress but by the Office of the Federal Register, and thus do not carry the force of law. *Id.* at 111-12.

In addition, Chief Judge Becker undertook a comprehensive review of the legislative history, including the committee reports accompanying each of the major amendments to the Controlled Substances Act of 1970, which point to Congress's intention to define multiple offenses in a single statutory provision. 271 F.3d at 109-10. Moreover, the Justice Department itself, in publications contemporaneous with the adoption of the current version of Section 841,

interpreted that statute as establishing separate offenses and stated that drug quantity should be included in the indictment and proven at trial. *Id.* at 110. Chief Judge Becker also contrasted the striking absence of language in Section 841 committing determination of drug quantity to the sentencing judge with the presence of just such language in other statutes. *Id.* at 111. Finally, Chief Judge Becker pointed to the massive variation in sentences – which can sometimes be measured in orders of magnitude – triggered by different findings of drug quantity, noting that this Court has repeatedly relied on much smaller sentencing differentials in determining that a particular fact is an element that must be proven at trial. *Id.* at 109-13; see *Castillo* v. *United States*, 530 U.S. 120, 127 (2000) (relying on a sixfold difference in the applicable punishment); *Jones*, 526 U.S. at 233 (citing a two-thirds increase in punishment). Although concluding that these factors were sufficient to make Congress's intention "clear" (271 F.3d at 113), Chief Judge Becker also recognized that his conclusion was supported by the canon of constitutional doubt, in light of the concerns raised by *Apprendi*. *Id.* at 113-14.

In addition to demonstrating the flaws in the First, Seventh, and Eleventh Circuit's holding that Section 841 always makes drug quantity a sentencing factor, Judge Becker's analysis makes evident the fatal weakness of the Second, Fifth, and Sixth Circuits' rather bizarre conclusion that the statute makes it a sentencing factor in some cases, but an element in others. This approach – which confuses the tasks of constitutional and statutory interpretation – depends on the extraordinarily unlikely proposition that Congress, in drafting Section 841, *anticipated* the *Apprendi* distinction and furthermore implicitly intended the statute to track that distinction. See 271 F.3d at 113-14 (stating that such an interpretation "strains credulity," and observing that "we can be sure that Congress did not intend to design § 841 to fit precisely within the contours of a constitutional rule that did not yet exist. It is much more likely that Congress intended

for drug type and quantity always to be elements of a § 841 offense."). Moreover, as a practical matter, the Second, Fifth, and Sixth Circuits' approach leaves the basic question of what constitutes the crime with which a defendant is charged to be determined only *ex post facto*, after sentencing – an approach that provides no guidance to courts and parties as to what facts must be included in an indictment and what evidence needs to be introduced at trial.

III. The Conflict Merits Resolution In This Case.

The conflict over whether drug quantity under Section 841 is an element of the offense or a sentencing factor is indisputably of sufficient importance to merit review in this Court. Section 841 is the principal federal drug statute. No provision of the federal criminal code is employed more frequently. See U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics, 2001 Fiscal Year (reporting that in fiscal year 2001, more than twenty thousand persons were sentenced for federal drug offenses pursuant to the Sentencing Guidelines – 41.2% of the *total* number of sentenced guideline offenders). Furthermore, "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones* v. *United States*, 526 U.S. 227, 232 (1999). The present disparity in the treatment of similarly situated defendants is accordingly intolerable.

Moreover, this case is an ideal vehicle with which to decide the question presented. In contrast to many similar petitions to this Court, here there is no doubt that the circuit conflict is outcome-determinative on these facts. The jury made a specific finding regarding the quantity of drugs for which petitioner was responsible. The guideline range to which petitioner was subject under the jury's findings is furthermore clear. By contrast, many other cases involve a dispute – which is inevitably irresolvable at the certiorari

stage – over whether the error is "harmless," with the government arguing that there was overwhelming evidence to sustain the judge's finding and the defendant arguing that the jury would have found a smaller drug quantity.

This is furthermore an ideal vehicle because it is a preserved error case. In many other Section 841 challenges, the defendant-petitioner has failed to argue below that the statute establishes elements of the offense rather than sentencing factors. The government in these cases contends that, even if Section 841 establishes elements of the offense, the failure to put the issue before the jury was not "plain error." Such disputes will cloud whether other cases are appropriate vehicles to resolve the question presented.

Finally, not only is the disagreement over the proper construction of Section 841 already thoroughly ventilated in the courts of appeals, but principles of sound judicial administration also mandate that the conflict be resolved promptly. If this Court defers ruling on the question presented, it will invite the same "considerable juridical chaos" (*Monge* v. *California*, 524 U.S. 721, 740 (1998) (Scalia, J., dissenting, joined by Souter & Ginsburg, JJ.)) and "judicial havoc" (*Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting, joined by Rehnquist, C.J. & Ginsburg, J.)), that followed its holdings in *Bailey* v. *United States*, 516 U.S. 137 (1995), and *Bousley* v. *United States*, 523 U.S. 614 (1998). In *Bailey*, having deferred deciding the question for many years, this Court finally held that "use" of a firearm under 18 U.S.C. 924 did not include "carrying" the weapon. 516 U.S. at 143. In *Bousley*, the Court recognized that *Bailey* must be applied retroactively (a conclusion that would also follow from any ruling on the question presented by this case) (523 U.S. at 621), and the courts of appeals subsequently uniformly held that *Bousley* commences a new one-year statute of limitations for bringing collateral challenges under the AEDPA. See *Pryor* v. *United States*, 278 F.3d 612, 613 (CA6 2002) ("join[ing] other circuits holding that the [AEDPA] limitations period commences with

the *Bousley* decision"). The result was a torrent of litigation in the lower courts. Cf. *United States* v. *Mack*, 229 F.3d 226, 244 n.9 (CA3 2000) (Becker, C.J., concurring) ("According to a Westlaw KeyCite performed August 30, 2000, *Bailey* has already been judicially cited 1893 times. It has also led to numerous re-sentencing proceedings."). It is essential that the question presented be resolved now rather than placing on the lower courts the similar burden of retroactively applying a later ruling by this Court finding that Section 841 establishes elements of the offense; the longer this Court waits to resolve the issue, the more this burden will be compounded.

Certiorari accordingly should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Peter Rodway
William Savage
Rodway & Horodyski
P.O. Box 874
Portland, ME 04104

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

October 16, 2003

APPENDIX

UNITED STATES of AMERICA, Appellee,

v.

BRIAN GOODINE, a/k/a DWAYNE GOODINE, Defendant, Appellant.

No. 02-1953

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

April 9, 2003, Decided

COUNSEL: Peter E. Rodway, with whom Rodway & Horodyski was on brief, for appellant.

F. Mark Terison, Senior Litigation Counsel, with whom Paula D. Silsby, United States Attorney, were on brief, for appellee.

JUDGES: Before Boudin, Chief Judge, Torruella and Lynch, Circuit Judges. LYNCH, Circuit Judge, concurring.

OPINION

TORRUELLA, Circuit Judge. A jury convicted Defendant-Appellant Brian Goodine of conspiracy and possession with intent to distribute cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) & 846 (2003).[1] By special verdict form, the jury indicated that the amount for each count was at least five, but less than fifty grams of cocaine base.

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[1] Goodine was tried with co-defendant Garry Julien, and both appeals were heard on the same date. Julien's appeal is addressed in *United States* v. *Julien*, No. 02-1765, 318 F.3d 316, 2003 U.S. App. LEXIS 1780 (1st Cir. Feb. 3, 2003).

The judge, however, determined that Goodine was responsible for 309.2 grams of crack, and sentenced him accordingly.

We are faced with two closely-related issues on appeal. First, Goodine alleges that the different penalty provisions under § 841(b) create separate crimes requiring the government to prove drug quantity beyond a reasonable doubt. Goodine asserts that he could only be sentenced pursuant to the jury's determination of drug quantity, but was erroneously sentenced pursuant to the judge's determination. Second, the judge imposed a mandatory minimum sentence based on drug quantity proved by preponderance of the evidence. Goodine raises an *Apprendi* challenge because that mandatory minimum sentence is higher than the sentencing guideline range to which he was exposed before the judge's finding as to drug quantity.

We find that drug quantity in § 841(b) is a sentencing factor, not an element of separate crimes. We also find that no *Apprendi* violation occurred here because the sentencing guidelines are not "statutory maximums" for purposes of *Apprendi*, and Goodine was not sentenced to a penalty greater than that authorized by the jury's finding. Goodine's sentence is therefore affirmed.

I. Introduction

Goodine does not dispute the jury verdict or the findings by the judge. He raises two legal challenges to his sentence. Goodine preserved these appeals at sentencing; we therefore apply de novo review. *United States* v. *Henderson*, No. 01-2392, 320 F.3d 92, 2003 U.S. App. LEXIS 2735, at *42 (1st Cir. Feb. 14, 2003); *United States* v. *Eirby*, 262 F.3d 31, 36 (1st Cir. 2001).

II. Drug Quantity as Sentencing Factors

A. Issue

The second subsection of the statute for drug possession with intent to distribute[2] delineates different penalty provisions based on drug quantity and other factors.[3] *See* 21 U.S.C. § 841(b). Three such provisions are relevant here. Defendants responsible for an unspecified amount of crack are exposed to a maximum sentence of twenty years under § 841(b)(1)(c), or thirty years if the defendant has a prior drug offense conviction. Defendants responsible for five or more grams of crack are exposed to five to forty years in prison, or ten years to life for defendants with a prior felony drug offense conviction under § 841(b)(1)(B). Finally, defendants responsible for at least fifty grams of crack are sentenced under § 841(b)(1)(A), which carries a possible penalty of ten years to life, or twenty years to life for defendants who have a prior conviction for a felony drug offense.

The jury convicted Goodine of possession with intent to distribute at least five grams (but less than fifty grams) of crack. Strictly following the jury's conviction, Goodine (who has a prior conviction for a felony drug offense) would be subject to a ten-year mandatory minimum sentence under § 841(b)(1)(B). However, the judge determined that Goodine was responsible for 309.2 grams of crack and sentenced him to the mandatory minimum sentence under § 841(b)(1)(A) -- twenty years.

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[2] Because the conspiracy statute, 21 U.S.C. § 846, adopts the sentencing scheme of 21 U.S.C. § 841, we need not address it separately.

[3] The statute also considers drug type, whether serious bodily injury resulted from the crime, and whether the defendant has a prior felony drug conviction. Our decision is limited to the issue of drug quantity, and leaves challenges to the other factors for another day.

Goodine asserts that § 841(b)(1)(A), (B), and (C) are different crimes with drug quantity as the differing element, and that because the government only proved beyond a reasonable doubt that he was responsible for five grams, he could only be sentenced to a ten-year mandatory minimum sentence under § 841(b)(1)(B). Goodine challenges the legal decision of the district court to sentence him under § 841(b)(1)(A) instead of § 841(b)(1)(B).

The government must prove every element of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). However, mere sentencing factors do not require such proof. *Patterson* v. *N.Y.*, 432 U.S. 197, 207 (1977) (holding that the State need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as . . . affecting . . . the severity of the punishment"). While the legislature is generally free to identify elements and sentencing factors, there are constitutional limits to this power. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 86 (1986). We must determine whether drug quantity is an element of offenses under § 841 that must be proved beyond a reasonable doubt, or merely a sentencing factor that may be determined by the judge by a preponderance of the evidence.

B. Relevant Cases

The distinction between "elements" and "sentencing factors" can be elusive, *see Apprendi* v. *New Jersey*, 530 U.S. 466, 494, and we admit that we have been wrong on similar questions before. *See United States* v. *Rivera-Gomez*, 67 F.3d 993, 996 (1st Cir. 1995) (holding that the federal carjacking statute identified only one crime; later rejected by the Supreme Court in *Jones* v. *United States*, 526 U.S. 227, 229 (1999)). This question is complicated by the Supreme Court's recent sentencing decisions. Before *Apprendi*, we held that drug-quantity delineations contained in § 841(b)(1) were sentencing factors that could be determined by a preponderance of the evidence. *See United States* v. *Lindia*, 82

F.3d 1154, 1160-61 (1st Cir. 1996). However, we have noted that the Supreme Court's decision in *Apprendi* "requires some rethinking of this approach." *United States* v. *Eirby*, 262 F.3d 31, 36 (1st Cir. 2001).

There is a split among our sister circuits who have considered this issue post-*Apprendi*. *Compare United States* v. *Wade*, No. 01-5210, 318 F.3d 698, 2003 U.S. App. LEXIS 2374, at *18 (6th Cir. Feb. 11, 2003) (holding that drug quantity under § 841 need not be proved beyond a reasonable doubt) *and United States* v. *Smith*, 308 F.3d 726, 740 (7th Cir. 2002) (same), *with United States* v. *Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000) ("If the government seeks enhanced penalties under 21 U.S.C. § 841(b)(1)(A) or (B), the [drug] quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt."), followed in *United States* v. *Turner*, No. 01-11589, 319 F.3d 716, 2003 U.S. App. LEXIS 1270, at *10-11 (5th Cir. Jan. 27, 2003) *and United States* v. *Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc).

This case presents us with a post-*Apprendi* opportunity to determine congressional intent regarding the drug quantity language of § 841. *Cf. United States* v. *Terry*, 240 F.3d 65, 74 n.9 (1st Cir. 2001) (not reaching the issue). We are assisted in this task by the Supreme Court's determination of congressional intent behind similar statutes. Five cases shape our analysis.

First, in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Supreme Court found that a five year mandatory minimum sentence for visible possession of a firearm during certain enumerated felonies was a sentencing factor that could be determined at sentencing. *Id.* at 84. The felonies had maximum sentences of ten or twenty years, and the Court found that the "statute [gave] no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. The

Court found that the instrumentality used in commission of a crime was a factor "that has always been considered by sentencing courts to bear on punishment" and therefore was not an element of the crime. *Id.* at 89. Although this was the first time the Supreme Court identified "sentencing factors" as distinct from "elements" of a crime, *McMillan* has subsequently been reaffirmed in light of recent sentencing decisions. *Harris* v. *United States*, 122 S. Ct. 2406, 2420 (2002).

In the second case, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), the Court considered 8 U.S.C. § 1326(b)(2), which predicated an increase in penalty on a prior conviction of aggravated felony. The Court held that prior conviction is a sentencing factor rather than an element establishing a separate offense. *Id.* at 226-27. In reaching this conclusion, the Court engaged in a detailed analysis of the statute's language, structure, legislative history, caption and placement, *id.* at 230-35, as well as functional factors such as potential unfairness, the magnitude of the increase, and whether prior conviction is traditionally treated as a sentencing factor or an element of the offense, *id.* at 234-36.

In the third case, *Jones* v. *United States*, 526 U.S. 227 (1999), the Court construed the federal carjacking statute, 18 U.S.C. § 2119 (1994 ed. & Supp. V). At the time, the statute set three different maximum sentences: fifteen years for a carjacking, twenty-five years if serious bodily injury resulted, and life imprisonment if death resulted. *Id.* at 230. The question was whether the statute "defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict." *Id.* at 229.

The Supreme Court began with the language and structure of the statute, noting that the statute appeared to identify one offense with several penalty provisions. *Id.* at

232. The Court called this first glance an unreliable guide to congressional intentions because the statute identified steeply higher penalties conditioned on further facts "that seem quite as important as the elements in the principal paragraph." *Id.* at 233. The penalty range increased by at least two-thirds (from fifteen years to twenty-five years), and to as much as life imprisonment, based on a finding that substantial bodily injury or death resulted. *Id.*

The Court found the legislative history "unimpressive" because it supported either intent – of serious bodily injury meant as a sentencing factor or as an element of the crime. *Id.* at 237-39.

The Jones Court reasoned that carjacking is a type of robbery, and "serious bodily injury has traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery." *Id.* at 235. Finding serious bodily injury to be an element corresponded to maintaining the jury's role as more than a mere low-level gatekeeper: if serious bodily injury was merely a sentencing factor, "in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment." *Id.* at 244.

Finally, the Jones Court noted that if a statute is equally susceptible of two interpretations, one of which raises "grave and doubtful constitutional questions" that the other does not, a court should interpret the statute so as to avoid the constitutional question. *Id.* at 239. By holding serious bodily injury to be an element of a crime requiring proof beyond a reasonable doubt, the Court avoided a constitutional question. *Id.*

In the fourth case to resolve a similar issue, *Castillo* v. *United States*, 530 U.S. 120 (2000), the Supreme Court considered a statute prohibiting the use or carrying of a firearm in relation to a crime of violence. The Court found

that the provision increasing the penalty from a minimum of five years to a minimum of thirty years when the weapon was a machinegun required that the type of weapon used be proved beyond a reasonable doubt. *Id.* at 131. The Court noted that the first sentence of the statute, which included the type of firearm used, identified the elements of the crime, while the second sentence described "factors (such as recidivism) that ordinarily pertain only to sentencing." *Id.* at 125. The Court further found that firearm type is not a traditional sentencing factor. *Id.* at 126. "Traditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out (e.g., that the defendant abused a position of trust or brandished a gun)." *Id.* The Court then found that asking a jury to resolve what type of weapon was used would not complicate a trial or risk unfairness. *Id.* at 127. The Court noted that the legislative history could have supported either view, but that the length and severity of the provision suggest that the language relating to different firearm types referred to elements of separate crimes. *Id.* at 130-31.

The final case offering guidance is *Harris* v. *United States*, 536 U.S. 545 (2002). There, the Supreme Court held that the statute for commission of a drug trafficking offense while using or carrying a firearm defines a single crime, and that whether the firearm was "brandished" or "discharged" is merely a sentencing factor to be determined by the judge. *Id.* at 2414. The Court found that the statute's structure suggested definition of one crime only, as the first paragraph listed the elements of a complete crime and the second paragraph described how defendants were to be punished. *See id.* at 2411-12 (interpreting 18 U.S.C. § 924(c)(1)(A)). The Court then considered "tradition and past congressional practice" and found that brandishing and discharging a firearm had not been treated as elements in other statutes, rather, they were classic sentencing factors. *Id.* at 2412. Further, nothing in the "text or history of the statute" rebutted the presumption drawn

from the statute's structure – that the statute identifies only one offense. *Id.* at 2413.

The *Harris* Court distinguished *Jones*, where the carjacking statute authorized "steeply higher penalties" based on whether injury or death resulted from the crime. *Id.* at 2412 (quoting *Jones*, 526 U.S. at 233). In the statute at issue in *Harris*, the consequence of a judicial determination that a firearm had been brandished or discharged was simply an increase in the mandatory minimum sentence. *Id.* at 2412-13. The Court found that the "incremental changes in the minimum – from 5 years, to 7, to 10 – are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *Id.* at 2413.

C. Application

Applying these cases to the drug statute at issue here, we begin with the language and structure of the statute. Section 841(a) lays out an offense that stands on its own, stating that "it shall be unlawful for any person knowingly or intentionally . . . to . . . possess with intent to distribute or dispense a counterfeit substance." *See* 21 U.S.C. § 841(a).[4]

---

[4] The relevant provisions of the statute read:

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally --
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

The next subsection sets sentencing ranges for violations of 841(a) based on drug quantity, drug type, prior conviction, and whether or not serious bodily injury resulted from the use of the counterfeit substance. *See* 21 U.S.C. § 841(b). A

> (b) Penalties. . . . Any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1) (A) In the case of a violation of subsection (a) of this section involving . . . (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .
>
> (B) In the case of a violation of subsection (a) of this section involving . . . (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . .
>
> (C) In the case of a controlled substance in schedule I or II, . . . such person shall be sentenced to a term of imprisonment of not more than 20 years . . . .

21 U.S.C. § 841(a)-(b).

straightforward reading suggests that part (a) identifies a crime and part (b) outlines different penalties for that crime. We have never directly answered this question, but we have previously stated that a switch from 841(b)(1)(B) to 841(b)(1)(A) does not affect the "substance" of the charge, *Eirby,* 262 F.3d at 38, and have referred to subsection (b) as designating "different sentencing regimes based on drug quantity" (and other factors). *United States* v. *Robinson*, 241 F.3d 115, 118 (1st Cir. 2001).

At the time § 841 was passed, Congress referred to the "sentencing procedures" as giving "maximum flexibility to judges," suggesting that Congress viewed the penalty provisions as sentencing factors. H.R. Conf. Rep. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. The legislative history on this point is scarce, and others have found it unhelpful. *See United States* v. *McAllister*, 272 F.3d 228, 231 (4th Cir. 2001).

In addition to the statutory text and legislative history, we find here other considerations which have heavily influenced the Supreme Court in finding that certain facts are sentencing factors rather than elements establishing an offense. First, drug quantity is a classic sentencing factor. *See* 18 U.S.C.S. Appx. § 2D1.1(c) (2003) (determining Sentencing Guideline base offense level based on drug type and quantity). Like many sentencing factors, it goes to the "nature and circumstances of the offense." *See Castillo*, 530 U.S. at 126 (quoting 18 U.S.C. § 3553(a)(1)). Permitting the judge to make a determination as to drug quantity is not permitting the tail of sentencing to wag the dog of the substantive offense. *See McMillan*, 477 U.S. at 88. The government must prove beyond a reasonable doubt all the elements of § 841(a); in this case the jury found that Goodine knowingly or intentionally possessed with intent to distribute at least five grams of a counterfeit substance (cocaine base). This determination exposed Goodine to sentencing under § 841(b), ranging from five years to life imprisonment. The judicial finding relating to

drug quantity simply guides the judge for sentencing purposes within this range. This is a typical sentencing scheme.

Second, due to *Apprendi* limitations discussed in Part III below, a jury's determination will cap the maximum sentence a judge can impose, regardless of drug quantity determination. Our holding that drug quantity is not an element of § 841 means that a judge's determination of drug quantity can influence the mandatory minimum sentence imposed, and such incremental changes in the minimum are typical sentencing provisions determined by the judge. *Harris*, 122 S. Ct. at 2413. The *Jones* Court's concern that a jury would merely be a low-level gatekeeper is unfounded because the jury determination in fact sets the maximum punishment.

Third, drug quantity goes to how the offense is conducted, rather than the result of the crime. As such, it is more analogous to the statutes in which the Supreme Court identified sentencing factors. Drug quantity is "not necessary to the determination of whether [defendant's] conduct was 'criminal' or 'innocent.'" *United States* v. *Collazo-Aponte*, 281 F.3d 320, 326 (1st Cir. 2002). It therefore is more like a sentencing factor than an element. Finally, we note a practical result of our ruling. Were all facts contained in § 841(b) to be treated as elements, the statute would define as many as 350 different offenses. *See United States* v. *Promise*, 255 F.3d 150, 175 (4th Cir. 2001) (en banc) (Luttig, J., concurring). Such an interpretation causes difficulty we think Congress did not intend. We therefore find that drug quantity for purposes of § 841 is a sentencing factor that may be determined by a preponderance of the evidence.

III. Application of *Apprendi* to the Sentencing Guidelines

With a judicial finding of 309.2 grams of cocaine base, Goodine was exposed to 168-210 months imprisonment under the Sentencing Guidelines. However, because § 841(b)(1)(A) carries a mandatory minimum sentence of twenty years imprisonment for defendants who have a prior conviction for a felony drug offense and are guilty of possessing with intent to distribute fifty or more grams of cocaine base, the judge sentenced Goodine to twenty years in prison. Goodine raises an *Apprendi* argument because this mandatory minimum sentence exceeded the high end of his Sentencing Guideline range.

The landmark case of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*'s limitation on punishment beyond the statutory maximum applies regardless of whether the fact is considered an "element" or a "sentencing factor." *Harris*, 122 S. Ct. at 2410. A sentencing court may use the preponderance of the evidence standard to find facts that require the imposition of a specified minimum sentence, so long as that sentence does not exceed the maximum sentence provided by the relevant statute. *Id.* at 2419 (plurality opinion); *id.* at 2421 (Breyer, J., concurring).

We have held that *Apprendi*'s holding "applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001); *United States* v. *Robinson*, 241 F.3d 115, 119 (1st Cir. 2001) ("Theoretical exposure to a higher sentence, unaccompanied by the imposition of a sentence that in fact exceeds the otherwise-applicable statutory maximum, is of no

consequence."). If the disputed fact (here, drug quantity) influences the sentence, but the resulting sentence is still below the default statutory maximum, there is no *Apprendi* violation. *Robinson*, 241 F.3d at 119; *United States* v. *Houle*, 237 F.3d 71, 80 (1st Cir. 2001). This is so even if the judge imposes a mandatory minimum sentence. *Robinson*, 241 F.3d at 122.

Section 841(b) delineates several different default statutory maximums based on drug quantity (and other factors not relevant here, such as drug type and whether or not seriously bodily injury resulted): 20 years if no drug quantity is specified, 40 years for five or more grams of cocaine base, and life for fifty or more grams of cocaine base. 21 U.S.C. § 841(b)(1)(A)-(C); *See also United States* v. *Martinez-Medina*, 279 F.3d 105, 121 (1st Cir.), *cert. denied*, 537 U.S. 921 (2002) (identifying default statutory maximum under § 841(b)(1)(A) as life); *Robinson*, 241 F.3d at 119 (identifying default statutory maximum as twenty years under § 841(b)(1)(C), where no quantity had been determined beyond a reasonable doubt); *United States* v. *Baltas*, 236 F.3d 27, 41 (1st Cir. 2001) (same); *Smith*, 308 F.3d at 741 (finding a default statutory maximum of 20 years for more than fifty kilograms of marijuana under § 841(b)(1)(C)).

In this case, the jury found Goodine guilty of conspiracy and possession with intent to distribute at least five grams of cocaine base. The default statutory maximum was therefore 40 years. Because he was sentenced to less than that – 20 years – there was no *Apprendi* violation.

Goodine argues that the "prescribed statutory maximum" in his case is the top of the Sentencing Guideline range (210 months) and that his sentence of 240 months violates the rule in *Apprendi* because it is based on a drug quantity determined by a preponderance of the evidence only. We disagree.

If we adopted Goodine's argument, we would essentially abolish the guidelines because the jury would be required to make findings as to all facts that may be relevant to sentencing ranges and potential adjustments. Nothing in *Apprendi* or subsequent cases calls into question the validity of the Sentencing Guidelines, and "we do not believe that the Court would have set in motion such a sea change in the law of sentencing without explicitly addressing the issue." *Robinson*, 241 F.3d at 121.

The guideline calculations are not restricted by *Apprendi*'s rule. *See United States* v. *Knox*, 301 F.3d 616, 620 (7th Cir. 2002); *United States* v. *Norris*, 281 F.3d 357, 361 (2d Cir. 2002). The guidelines themselves state that where a "statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." 18 U.S.C.S. Appx. § 5G1.1 (2002). Nothing further is needed to impose a mandatory minimum sentence in excess of the guideline range, as the guideline range yields to the statutory minimum sentence. Here, the statutorily required minimum sentence of twenty years became the guideline sentence. Therefore, Goodine's sentence did not offend *Apprendi*.

IV. Conclusion

Goodine's sentence is **affirmed**.

LYNCH, Circuit Judge, concurring. I concur in the affirmance of the sentence. As to Goodine's argument that drug quantity under 21 U.S.C. § 841(b) is an element of a crime and not a sentencing factor, I think the argument is foreclosed by *United States* v. *Robinson*, 241 F.3d 115, 118 (1st Cir. 2001), *United States* v. *Eirby*, 262 F.3d 31, 35-38 (1st Cir. 2001), and *United States* v. *Lindia*, 82 F.3d 1154, 1160-61 (1st Cir. 1996). The claim that there is a violation of the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), is foreclosed by *Harris* v. *United States*, 536 U.S. 545 (2002).

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES
OF AMERICA

V.
BRIAN GOODINE

Case Number 2:01CR25-P-H-02
Entered on Docket : 8.1.2002
Peter E. Rodway, Esq.
Defendant's Attorney

JUDGMENT IN CRIMINAL CASE
For Offences Committed On or After Nov. 1, 1987

THE DEFENDANT:
Was found guilty on count(s) One and Ten (indictment) after a plea of not guilty.
ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841 (a)(1) and 841 (b)(1)(B)	Conspiracy to Distribute and Possess with Intent to Distribute 5 or more grams of cocaine base	3/19/2001	One
21 U.S.C. §§ 841 (a)(1) and (b)(1)(B)	Conspiracy to Distribute and Possess with Intent to Distribute 5 or more grams of cocaine base	3/19/2001	Ten

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 247-73-6654

August 1, 2002
Date of Imposition

Defendant's Date of Birth: 6/10/1978

Defendant's USM No.: 04027-036
Defendant's Residence Address:
15096 South Radio Station Road
Seneca, SC 29678

D. Brock Hornby, United States District Judge
Name & Title of Judicial Officer

Defendant's Mailing Address
Cumberland County Jail
50 County Way
Portland, ME 04102

8/1/02
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of TWO HUNDRED FORTY (240) MONTHS on Counts One and Ten to be served concurrently.

The defendant shall receive credit for time spent in presentence detention.

The cost of incarceration fee is waived.

The court makes the following recommendations to the Bureau of Prisons: **The court notes that the defendant is a resident of South Carolina and recommends that he be incarcerated in a facility within close proximity to that area.**

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of EIGHT (8) YEARS.

The Defendant shall report to the probation office in the district which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If the judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (see forth below).

The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family obligations;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special guest of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. Defendant shall not use or possess any controlled substances or intoxicants to include joint, sole, actual or constructive possession; and shall participate in a program of drug and alcohol abuse therapy to the satisfaction of the supervising officer. This may include testing to determine if the defendant has made use of drugs or intoxicants. Defendant shall pay/co-pay for services provided during the course of such treatment, to the supervising officer's satisfaction.

2. Defendant shall at all times readily submit to a search of his residence, and of any other premises under his dominion and control, by his supervising officer, upon the officer's request when the officer has reasonable basis to believe that such a search will lead to the discovery of evidence of the defendant's violation of the terms of his supervised release. Failure to submit to such a search may be grounds for revocation.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following criminal monetary penalties:

	Assesment	Fine	Restitution
Totals:	$200	$0	$0

FINE

The court finds that the defendant does not have the ability to pay a fine. The Court will waive the fine in this case.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Payments shall be applied in the following order: (1) assessment.

A In full immediately.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of

imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 1953

UNITED STATES,
Appellee,

v.

BRIAN GOODINE, a/k/a DWAYNE GOODINE,
Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Torruella, Selya, Lynch, Lipez,* and Howard, *Circuit Judges*.

ORDER OF THE COURT

Entered: May 19, 2003

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
RICHARD CUSHING DONOVAN
Clerk.

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*Judge Kermit Lipez is recused from this matter.

[cc: Messrs: Rodway, Dratel, Sweeney, Zalkind, Terison and Ms. Price]

(3)

Supreme Court, U.S.
FILED
FEB 6 - 2004
OFFICE OF THE CLERK

No. 03-596

In the Supreme Court of the United States

BRIAN GOODINE, A/K/A DWAYNE GOODINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether drug quantity is an element of the offenses of possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841, and conspiring to possess a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 846.

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In the Supreme Court of the United States

No. 03-596

BRIAN GOODINE, A/K/A DWAYNE GOODINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 326 F.3d 26.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2003. A petition for rehearing was denied on May 19, 2003 (Pet. App. 22a-23a). On August 8, 2003, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including September 17, 2003. On September 8, 2003, Justice Souter further extended that time to and including October 16, 2003, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Maine, petitioner was convicted of conspiring to possess cocaine base with the intent to distribute it, in violation of 21 U.S.C. 846, and possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 240 months of imprisonment on each count, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1a-15a.

1. From June 2000 through March 2001, petitioner dealt in cocaine base with two drug organizations in Maine. In April 2001, a federal grand jury in the District of Maine returned a multi-count indictment against petitioner and two co-defendants. Count 1 charged petitioner with conspiring with his co-defendants and others to distribute, and to possess with the intent to distribute, "50 or more grams of cocaine base," in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846. Indictment 1-2. Count 10 charged petitioner with possessing "50 or more grams of cocaine" with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A). Indictment 5. Before trial, the government filed an information pursuant to 21 U.S.C. 851 asserting that petitioner had a prior felony drug conviction.

The jury found petitioner guilty on Counts 1 and 10. The jury specifically found that the quantity of cocaine base involved in those offenses was "5 or more grams," but not "50 or more grams." Pet. App. 3a.

2. Petitioner was subject to sentencing on each count under the graduated penalties set forth in 21 U.S.C. 841(b). In the case of a defendant who, like

petitioner, has a prior felony drug conviction, Section 841(b)(1)(A)(iii) prescribes a maximum term of life imprisonment and a mandatory minimum term of 20 years of imprisonment if the offense involves "50 grams or more" of cocaine base. Section 841(b)(1)(B)(iii) prescribes a maximum term of life imprisonment and a mandatory minimum term of ten years of imprisonment for a recidivist defendant whose offense involves "5 grams or more," but less than 50 grams, of cocaine base.

The Probation Office recommended that petitioner be held accountable for 309.2 grams of cocaine base. Presentence Report (PSR) ¶ 23. That quantity subjected petitioner to a sentencing range of 168 months to 210 months of imprisonment under the Sentencing Guidelines. *Id.* ¶ 47. The Probation Office noted, however, that the district court could impose a 20-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A), if the court found that petitioner's offenses involved 50 grams or more of cocaine base. PSR ¶ 46 (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986)).

Petitioner objected to the Probation Office's calculation of drug quantity and to the imposition of a 20-year mandatory minimum sentence. Petitioner argued that the imposition of that sentence would violate the rule articulated in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Petitioner contended that the *Apprendi* rule should apply to the imposition of a sentence that would exceed the otherwise applicable Guidelines range based on a fact found by the court under a preponderance standard. Def. Sent. Mem. 2-5 (filed July 23, 2002).

Alternatively, petitioner argued that drug quantity is an element of his offenses, so that the court could not give effect to any such finding for purposes of sentenc ing. See *id.* at 6-9.

At sentencing, the district court found that petitioner was responsible for 309.2 grams of cocaine base. Relying on a "plain reading" of Section 841 as well as *Harris* v. *United States*, 536 U.S. 545 (2002), the court explained that the jury's special verdict on drug quantity determines only the statutory maximum sentence, not the minimum sentence. Sent. Tr. 17. Having found petitioner responsible for more than 50 grams of cocaine base, the court imposed concurrent 20-year mandatory minimum sentences under 21 U.S.C. 841(b)(1)(A) on each count. Sent. Tr. 18.

3. The court of appeals affirmed. The court held that the imposition of a 20-year mandatory minimum sentence did not violate the *Apprendi* rule, because that sentence did not exceed the statutory maximum sentence authorized by the jury's verdict under 21 U.S.C. 841(b)(1)(B)(iii). See Pet. App. 13a-15a.[1]

As particularly relevant here, the court of appeals concluded, as a matter of statutory construction, that drug quantity is "not an element" of a drug offense under Section 841. Pet. App. 2a, 12a. The court observed that a "straightforward reading" of the statutory text indicates that Section 841(a) was designed to "identif[y] a crime," whereas Section 841(b) was

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[1] The court of appeals identified the statutory maximum sentence under 21 U.S.C. 841(b)(1)(B) as 40 years of imprisonment. In fact, because of petitioner's prior felony drug conviction, the statutory maximum sentence under that provision was life imprisonment. The difference between a 40-year maximum and a life maximum does not affect the analysis.

designed to "outline[] different penalties for that crime." *Id.* at 10a-11a. The court also read the Conference Report, which described the "sentencing procedures" under Section 841 as giving "maximum flexibility to judges," as indicating that Section 841(b) was intended to provide sentencing factors. *Id.* at 11a (quoting H.R. Conf. Rep. No. 1444, 91st Cong., 2d Sess. (1970)). Aside from the text and history of Section 841, the court reasoned that "drug quantity is a classic sentencing factor"—a fact that "goes to how the offense is conducted, rather than the result of the crime." *Id.* at 11a-12a. Finally, the court suggested that a construction of Section 841 that classified drug quantity as an offense element would "cause[] difficulty we think Congress did not intend" by effectively creating "as many as 350 different offenses." *Id.* at 12a (citing *United States* v. *Promise*, 255 F.3d 150, 175 (4th Cir. 2001) (Luttig, J., concurring), cert. denied, 535 U.S. 1098 (2002)).[2]

ARGUMENT

Petitioner contends that the court of appeals erred in holding, as a matter of statutory construction, that drug quantity is not an element of an offense under 21 U.S.C. 841. Petitioner also asserts that the court of appeals' holding deepens a circuit conflict on that question. See Pet. 4-13. The court of appeals' decision is correct. There is no clear circuit conflict on the question presented by the petition. And the question does not

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[2] The court of appeals stated that, because Section 846 "adopts the sentencing scheme of [Section 841]," it was unnecessary separately to address the construction of Section 846. Pet. App. 3a n.2. For that reason, and in the interest of simplicity, this brief adheres to the court of appeals' approach in not separately referring to Section 846.

appear to be of sufficient practical importance to warrant this Court's review at this time.[3]

1. Within broad constitutional limits, "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Accordingly, whether a particular fact specified in a federal criminal statute is an offense element or a sentencing factor (*i.e.*, one that affects the sentence within the legislatively prescribed range) is preeminently a question of congressional intent. See, *e.g.*, *Castillo* v. *United States*, 530 U.S. 120, 124 (2000); *Jones* v. *United States*, 526 U.S. 227, 232-239 (1999); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998). The resolution of such questions, as with all questions of statutory interpretation, turns on the "language, structure, subject matter, context, and history" of the statute. *Castillo*, 530 U.S. at 124; *Almendarez-Torres*, 523 U.S. at 228. Applying those principles to Section 841, the court of appeals correctly reaffirmed its prior decisions holding that drug quantity is not an element of the crime proscribed by Section 841(a).

a. The text, structure, and history of Section 841 reflect Congress's intent to create a single offense with graduated penalties based on, among other things, the type and quantity of drugs at issue.

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[3] Petitioner does not raise any constitutional challenge to his sentence, including the claim raised below that, for purposes of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the top end of the Guidelines range should be treated as the statutory maximum sentence. Cf. *Blakely* v. *Washington*, cert. granted, 124 S. Ct. 429 (2003).

First, Section 841(a) states, in relevant part, that "it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." Section 841(a) thus describes the prohibited conduct and the accompanying state of mind required for a violation, without reference to drug type or quantity. So long as the indictment charges and the jury finds that a defendant knowingly or intentionally engaged in one of the specified prohibited acts involving any detectable amount of "a controlled substance," the offense defined in Section 841(a) is complete.

The specific quantity involved in such an offense becomes relevant only in applying Section 841(b). That subsection states, with certain exceptions, that "any person who *violates subsection (a)* of this section shall be *sentenced*" according to rules that specify particular sentences or sentencing ranges for particular types and quantities of drugs. 21 U.S.C. 841(b)(1)-(4) (emphases added). The statutory text thus distinguishes the elements required for conviction (in Section 841(a)) from the factors relevant to sentencing (in Section 841(b)).

Second, the statutory history confirms that Congress did not intend the facts identified in Section 841(b), such as drug quantity, to be offense elements. Sections 841(a) and (b) were originally enacted as Sections 401(a) and (b) of the Controlled Substances Act of 1970, Pub. L. No. 91-513, Title II, §§ 401-410, 84 Stat. 1260-1269. In that Act, those provisions appeared under the heading "Part D—Offenses and Penalties," and the subheading "Prohibited Acts A—Penalties." To the extent that the statute's language and structure leave any doubt about its meaning, those headings provide further indication that Congress was defining the

"offense" in subsection (a) and the "penalties" in subsection (b). Cf., *e.g.*, *Almendarez-Torres*, 523 U.S. at 234 (recognizing that statutory section headings may be considered in clarifying Congress's intent).

Such a reading accords with the House Report accompanying the Controlled Substances Act of 1970. The Report describes Section 401(a) as "mak[ing] it unlawful" knowingly or intentionally to engage in certain prohibited acts involving drugs, and describes Section 401(b) as "establish[ing] *the following penalties* for anyone who violates [S]ection 401(a)." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 46 (1970) (emphasis added). The Report's explanation reinforces the conclusion that Congress intended to create a single offense-defining provision (in Section 841(a)) and a separate penalty provision (in Section 841(b)).[4]

b. Before *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), all 12 regional courts of appeals, applying variations of the foregoing analysis, concluded that Congress

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[4] Petitioner erroneously contends that the Department of Justice interpreted drug quantity to be an offense element in a publication issued contemporaneously with the enactment of Section 841 in its current version. Pet. 10-11; see U.S. Dep't of Justice, *Handbook on the Anti-Drug Abuse Act of 1986* (*Handbook*) (Mar. 1987). The *Handbook*, which was "not intended to have the force of law or of a United States Department of Justice directive," simply "recommend[ed]" that drug type and quantity "be specified in the indictment and proven at trial." *Handbook* at v (citing *United States* v. *Caceres*, 440 U.S. 741 (1979)); *id.* at 20 (citing three lower court decisions construing predecessor statutes). The *Handbook* followed those citations with a "but see" reference to this Court's then-recent decision in *McMillan* v. *United States*, 477 U.S. 79 (1986), thereby at least raising the question whether *McMillan*'s holding that sentencing factors could be proved to the judge by a preponderance standard would have relevance to Section 841. *Handbook* 20-21.

did not intend drug quantity to be an element of an offense under Section 841. See, *e.g.*, *United States* v. *Lindia*, 82 F.3d 1154, 1160 (1st Cir. 1996) ("Drug quantity * * * is not an element of the offense of conviction."); *United States* v. *Campuzano*, 905 F.2d 677, 679 (2d Cir.) ("Section 841(a) of Title 21 prohibits the distribution of *any* amount of cocaine and in no way requires proof of a particular quantity of narcotics as an element of the conspiracy to distribute."), cert. denied, 498 U.S. 947 (1990); *United States* v. *Lewis*, 113 F.3d 487, 490-491 (3d Cir. 1997) ("[S]ection 841(a) is entitled 'Unlawful acts,' suggesting that the section completely sets forth the elements of the offenses it creates."), cert. denied, 523 U.S. 1108 (1998); *United States* v. *Fletcher*, 74 F.3d 49, 53 (4th Cir.) ("[Q]uantity is not a substantive element of the crime."), cert. denied, 519 U.S. 857 (1996); *United States* v. *Morgan*, 835 F.2d 79, 81 (5th Cir. 1987) ("[Q]uantity is not an element of the crimes proscribed by sections 841(a)(1) and 846."); *United States* v. *Todd*, 920 F.2d 399, 407 (6th Cir. 1990) ("[T]he amount of drug determined pursuant to section 841(b) is not an element of the offense stated in section 841(a)."); *United States* v. *Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989) ("Section 841(b) has nothing to do with the substantive elements of the underlying offense."); *United States* v. *Wood*, 834 F.2d 1382, 1388 (8th Cir. 1987) ("[T]he quantity of cocaine is not an element of a 'separate offense.'"); *United States* v. *Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991) ("Section 841(a) does not specify drug quantity as an element of the substantive offense of possession with intent to distribute."), cert. denied, 502 U.S. 1100 (1992); *United States* v. *Jenkins*, 866 F.2d 331, 334 (10th Cir. 1989) ("[T]he quantity of the substance in the possession of the defendant * * * is not an element of the

substantive offense upon which the charge is based."); *United States* v. *Van Hemelryck*, 945 F.2d 1493, 1503 (11th Cir. 1991) ("[Q]uantity is not an element of 21 U.S.C. 841(a)(1) because quantity is not included as an element in the definition of the offense under that subsection."); *United States* v. *Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992) ("[T]he quantity of drug possessed is not a constituent element of the offense of possession with intent to distribute under 21 U.S.C. 841(a)."). Relying on the statutory text and structure, the legislative history, and other interpretive clues, those courts concluded that Congress intended for drug quantity to be a sentencing factor found by the court by a preponderance of the evidence.[5]

2. In *Apprendi*, 530 U.S. at 490, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court subsequently elaborated that, "[i]n federal prosecutions, such facts must also be charged in the indictment." *United States* v. *Cotton*, 535 U.S. 625, 627 (2002).

The Court's decision in *Apprendi* concerns the requirements of the Constitution, not the interpretation of a statute. As the Eleventh Circuit has explained, "*Apprendi* did not announce any new principles of statutory construction," and, consequently, "does not

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[5] Several of those courts relied, in part, on the fact that, in the United States Code, Section 841(a) is titled "[u]nlawful acts" while Section 841(b) is titled "[p]enalties." As petitioner notes (Pet. 10), those subheadings were not enacted by Congress. The statutory text, structure, and history nevertheless support the conclusion that Section 841 creates separate offense and penalty provisions. See pp. 6-8, *supra*.

change [pre-*Apprendi*] precedent interpreting Section 841." *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (11th Cir. 2001) (en banc), cert. denied, 535 U.S. 942 (2002). Instead, *Apprendi* imposes a "constitutional restraint," *ibid.*, that is "external to" the particular statutory scheme under which a prosecution occurs. *United States* v. *Brough*, 243 F.3d 1078, 1079 (7th Cir.) (explaining that *Apprendi*'s "constitutional requirements are external to Section 841"), cert. denied, 534 U.S. 889 (2001).

Apprendi thus does not hold that, in order for a fact to be used to increase the statutory maximum sentence, the fact must have been intended by the legislature to be an element of the offense. To the contrary, the Court emphasized in *Apprendi* that it makes no difference how the legislature structures a statute or what the legislature calls a fact that increases the statutory maximum sentence, because "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 530 U.S. at 494; see *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."). The Court explained that such facts, whether or not intended by the legislature to be elements, are the "functional equivalent" of elements when they are used to enhance a sentence, and thus must be subject to the same constitutional requirements when so used. *Apprendi*, 530 U.S. at 494 n.19; see *Harris* v. *United States*, 536 U.S. 545, 562 (2002) (plurality opinion) (explaining that the fact at issue in *Apprendi* "functioned more like a 'traditional element'" than a sentencing factor). But

that does not mean that the legislature itself must be deemed to have intended the fact to be an element; it simply means that the Constitution requires that the fact be treated as if the legislature so intended.

3. Petitioner asserts that, in the wake of *Apprendi*, the courts of appeals have disagreed about whether Congress intended for drug quantity to be an offense element under Section 841. Pet. 4-10. Petitioner states that one court of appeals has held that Section 841 "makes drug quantity an element," others have held that "Section 841(b) sets forth sentencing factors," and still others have "adopted a hybrid statutory interpretation" under which drug quantity is an "element" when it affects the statutory maximum penalty. Pet. 6, 9. The cases on which petitioner relies, understood in context, do not support his suggestion of a circuit conflict on whether Congress meant for drug quantity to be an element of a Section 841 offense.

a. In light of *Apprendi*'s constitutional holding, the courts of appeals have consistently recognized that, in order to support a sentence in excess of the otherwise applicable statutory maximum under Section 841(b), the threshold drug quantities specified in that subsection must be treated *as if* they are offense elements. That is, in order for an enhanced sentence to be imposed, the threshold drug quantity must be alleged in the indictment and submitted to the jury for determination beyond a reasonable doubt. That requirement exists *not* because Congress made drug quantity an element of a federal drug offense, but because the Constitution requires such protections whether drug quantity is an element or not. See, *e.g.*, *United States* v. *Jackson*, 327 F.3d 273, 285 (4th Cir.) ("*Apprendi* and its progeny have identified a circumstance in which a fact that the legislature characterized as a sentencing factor

must, as a matter of constitutional imperative, be treated as an element—*i.e.*, when that fact increases the potential punishment beyond the statutory maximum."), cert. denied, 124 S. Ct. 566 (2003); *United States* v. *Minore*, 292 F.3d 1109, 1116 (9th Cir. 2002) (stating that, when an enhanced sentence is sought, "drug quantity—even though usually labeled a sentencing factor—is the 'functional equivalent' of an element"), cert. denied, 537 U.S. 1146 (2003); *United States* v. *Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001) ("Under *Apprendi*, drug identity must be treated as an element only when it results in a sentence beyond the relevant statutory maximum."), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Mietus*, 237 F.3d 866, 875 (7th Cir. 2001) (stating that, under *Apprendi*, facts that trigger an increased statutory maximum sentence "must be treated as elements of the offense").

b. No court of appeals has purported to overrule its pre-*Apprendi* holding that Congress did not make drug quantity an element of a Section 841 offense. To the contrary, those courts of appeals that have revisited the statutory construction issue since *Apprendi* have reaffirmed their earlier conclusions that Congress did not intend for drug quantity to be an offense element. See *Sanchez*, 269 F.3d at 1268 (stating that "*Apprendi* * * * does not change our precedent interpreting Section 841" to create sentencing factors); *United States* v. *Smith*, 308 F.3d 726, 740-741 (7th Cir. 2002); Pet. App. 2a, 9a-12a; see also *United States* v. *Toliver*, 351 F.3d 423, 430 (9th Cir. 2003) (discussed at pp. 16-17, *infra*).[6]

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[6] Petitioner asserts that the Third and Fourth Circuits have "avoided resolving the statutory construction question." Pet. 10 (citing *United States* v. *Vazquez*, 271 F.3d 93 (3d Cir. 2001) (en

Petitioner contends that the D.C. Circuit in *United States* v. *Graham*, 317 F.3d 262 (2003), "definitively held that Section 841 makes drug quantity an element" for all purposes. Pet. 6. But there is nothing at all "definitive" in *Graham* on the question of statutory construction presented here. In that case, the court of appeals held that the district court could not sentence the defendant under Section 841(b)(1)(A) in the absence of a jury finding that his drug conspiracy offense involved the requisite threshold quantity of cocaine base. Observing that post-*Apprendi* circuit precedent had

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banc), cert. denied, 536 U.S. 963 (2002), and *United States* v. *Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), cert. denied, 535 U.S. 1098 (2002)). Petitioner's choice of the term "avoid[ance]" is questionable. In *Vazquez*, having held that *Apprendi* requires drug quantity to be treated as an offense element when an enhanced sentence is sought under Section 841(b), the Third Circuit had no occasion to revisit its pre-*Apprendi* decisions holding that drug quantity is a sentencing factor. See *Vazquez*, 271 F.3d at 99; *id.* at 108 (Becker, C.J., concurring) (explaining that the majority's conclusions concerning *Apprendi* "implicitly signal[] that it is satisfied with our prior statutory construction of Section 841 [as a sentencing factor] and will continue to apply it in cases where no constitutional—*i.e.*, *Apprendi*—difficulty arises"). In *Promise*, a majority of the Fourth Circuit appeared to accept the continued validity of its pre-*Apprendi* construction of Section 841(b) as not creating offense elements. See *Promise*, 255 F.3d at 156-157 (plurality opinion of Wilkins, J.) ("[W]e have previously held, as three of my colleagues reiterate now, that Congress intended [for drug quantities] to be sentencing factors."); *id.* at 169 (Luttig, J., concurring) ("I would hold without any hesitation whatsoever that *Congress'* manifest intent is that the sole offenses established in section 841 are those set forth in sections 841(a)(1) and (a)(2)."); *id.* at 167 (Niemeyer, J., concurring, joined by Gregory, J.) ("I would conclude that the only rational reading of 21 U.S.C. § 841 is that elements of the offense are stated in § 841(a) and the sentencing factors are provided in § 841(b).").

"implicitly treated § 841 as a tripartite statute" (*i.e.*, as one "establishing three separate offenses, with different maximum sentences based on drug quantity"), the court of appeals concluded that, when the jury does not make a drug quantity finding, the term of imprisonment as well as the term of supervised release must be imposed under Section 841(b)(1)(C). 317 F.3d at 274-275. Because it was unclear whether the defendant's five-year term of supervised release in *Graham* was imposed under Section 841(b)(1)(A) or Section 841(b)(1)(C), the court of appeals remanded for resentencing. *Id.* at 275.

Seizing on *Graham*'s "tripartite statute" language, petitioner asserts that the D.C. Circuit has construed Section 841 as making drug quantity an offense element. Pet. 6-7. At best for petitioner, however, *Graham* is equivocal on that point. *Graham* did not present a pure question of statutory construction. And neither *Graham* nor the cases it relied on addressed Congress's intent in enacting the statute or otherwise applied tools of statutory construction to determine whether Section 841(b) creates offense elements. Cf., *e.g.*, *United States* v. *Williams*, 194 F.3d 100, 102-107 (D.C. Cir. 1999) (applying traditional tools of statutory construction, before *Apprendi*, to reaffirm circuit precedent holding that drug quantity is not an offense element under Section 841), cert. denied, 531 U.S. 1178 (2001).

Although the D.C. Circuit has referred to drug quantity after *Apprendi* as an "element," that characterization is properly understood to mean not that Congress intended it to be an element, but that the Constitution requires that it be treated as if it were an element when an enhanced sentence is sought. The cases that *Graham* cites are consistent with that under-

standing. See *United States* v. *Webb*, 255 F.3d 890, 896 (D.C. Cir. 2001) (observing that after *Apprendi*, "if Section 841 were interpreted as a tripartite statute * * * then the drug quantity thresholds *effectively are elements* that must be decided by a jury") (emphasis added); *United States* v. *Fields*, 242 F.3d 393, 396 (D.C. Cir. 2001) ("In light of *Apprendi*, it is now clear that, in drug cases under 21 U.S.C. §§ 841 and 846, before a defendant can be sentenced to any of the progressively higher statutory maximums that are based on progressively higher quantities of drugs specified in subsections 841(b)(1)(A) or (B), the Government must state the drug type and quantity in the indictment, submit the required evidence to the jury, and prove the relevant drug quantity beyond a reasonable doubt.").

Although petitioner initially contended that the Ninth Circuit, as well as the D.C. Circuit, "holds that drug quantity is an element of the offense under Section 841" (Pet. 7), petitioner no longer presses that contention. See Letter of Thomas C. Goldstein to Hon. William K. Suter (Jan. 6, 2004). As petitioner acknowledges, "the Ninth Circuit's intervening decision in *United States* v. *Toliver* is consistent with the decision below" in this case. *Ibid.* (internal citation omitted). As the court of appeals explained in *Toliver*:

> [D]rug quantity and type need only be treated as "functional equivalent[s]" of formal elements of an offense when a particular drug type or quantity finding would expose a defendant to an increased maximum statutory sentence, as they do not constitute formal elements of separate and distinct offenses under section 841(b)(1). When drug quantity or type would not have such an effect, they need not be accorded this special treatment. Thus,

> while we may label a fact as the "functional equivalent of an element" for purposes of *Apprendi*, that does not transform the fact into an offense "element" for purposes of [*In re*] *Winship*[, 397 U.S. 358 (1970)].

351 F.3d at 430. The Ninth Circuit reiterated the same point in *United States* v. *Thomas*, No. 02-10409, 2004 WL 112644, at *4 (Jan. 26, 2004) ("[D]rug type and quantity 'do not constitute formal elements of separate and distinct offenses under section 841(b)(1).'") (quoting *Toliver*, 351 F.3d at 430). In view of the categorical rejection in *Toliver* and *Thomas* of the suggestion that drug quantity and type are elements of a Section 841 offense, there is no merit to petitioner's new assertion that "the precedent of the Ninth Circuit is presently simply confused" on the question presented. Letter at 1.

c. Petitioner also contends that, while several other courts of appeals have "h[e]ld that Section 841(b) sets forth elements of the offense," they have done so only when a sentence exceeds the statutory maximum. See Pet. 9 (citing *United States* v. *Darwich*, 337 F.3d 645, 655 (6th Cir. 2003), *United States* v. *Mendoza- Gonzalez*, 318 F.3d 663, 673 (5th Cir.), cert. denied, 123 S. Ct. 2114 (2003), and *United States* v. *Thomas*, 274 F.3d 655, 663-664 (2d Cir. 2001) (en banc)). Although those courts have occasionally referred to drug quantity as an "element" of a Section 841 offense, see, *e.g.*, *Thomas*, 274 F.3d at 663-664, that description cannot plausibly be understood to encompass a sub silentio conclusion that drug quantity is a legislatively mandated "element." The decisions that petitioner cites do not analyze whether Congress intended drug quantity to be an offense element. Nor do they overrule or repudiate

pre-*Apprendi* precedent holding that Congress did *not* intend to create elements.

Rather, the courts' use of the term "element" is most naturally understood as a shorthand way of expressing the concept that, when an enhanced sentence is sought, the Constitution requires that drug quantity be treated *as if* it were an element. Indeed, the Second Circuit has cautioned against reading too much into the language in *Thomas* upon which petitioner relies: "In *Apprendi* and *Thomas*," the court explained, "the term 'element' was used simply as a shorthand for a set of procedural requirements" that must be adhered to when an enhanced sentence is sought. *Coleman* v. *United States*, 329 F.3d 77, 86 (2d Cir. 2003); cf. *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004) ("We must read this * * * general language * * * as we often read general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."). Thus, petitioner's assertion that those cases reflect an anomalous "hybrid *statutory* interpretation" (Pet. 9 (emphasis added)), under which supposedly statutorily mandated elements are only elements some of the time, is untenable. The cases instead embody a rational synthesis of congressional intent (not to treat drug quantity as an element for all purposes) and constitutional command (to treat drug quantity as an element when necessary to support an enhanced sentence).

Accordingly, because no court of appeals has clearly held, either before or after *Apprendi*, that Congress intended for drug quantity to be an offense element, there is no square circuit conflict on that question.

4. It is unclear whether, or to what extent, the question presented in the petition has prospective significance. After *Apprendi*, in cases in which the government intends to seek an increase in the otherwise applicable statutory maximum sentence, federal prosecutors routinely assure that the threshold drug quantity needed for an enhanced sentence is charged in the indictment and submitted to the jury for determination beyond a reasonable doubt. Consequently, the question whether Congress itself intended for drug quantity to be an offense element is ordinarily of little, if any, prospective importance in cases like this one, because drug quantity is being treated as if Congress *had* intended it to be an element. The question presented would recur in cases in which the jury finds that a threshold quantity of drugs was not proved beyond a reasonable doubt (thereby precluding an increase in the statutory maximum sentence), but the court then finds that the threshold quantity was proved by a preponderance of the evidence (thereby requiring the court to impose the mandatory minimum sentence associated with that finding). To date, this appears to be the only case to present that precise scenario. This Court's review is not warranted absent any indication that the same scenario will arise with any frequency in the future.[7]

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[7] The distinction between offense elements and sentencing factors may also affect guilty plea practice when a defendant seeks to plead guilty to a violation of Section 841(a) while contesting the drug quantity alleged in the indictment as a basis for imposing an enhanced sentence under Section 841(b). See *Thomas*, 2004 WL 112644, at *6 (holding that, "even where due process requires that a drug quantity allegation be pleaded in an indictment and proved to a jury beyond a reasonable doubt, a defendant can plead guilty to the elements of the offense without admitting the drug quan-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

FEBRUARY 2004

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tity," which the defendant could not do if drug quantity were an element). The impact of the distinction under Section 841 between offense elements and sentencing factors in the guilty plea context is unclear, however, since it has been addressed to date rarely, if at all, apart from the recent decision in *Thomas*.

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No. 03-596

IN THE

Supreme Court of the United States

Brian Goodine,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR THE PETITIONER

Peter Rodway
William Savage
RODWAY & HORODYSKI
P.O. Box 874
Portland, ME 04104

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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QUESTION PRESENTED

Under 21 U.S.C. 841, is drug quantity an element of the offense or instead a sentencing factor?

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REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that this case presents the important and recurring circuit conflict over whether, under 21 U.S.C. 841, drug quantity is an element of the offense (which is the D.C. Circuit's rule) or instead a sentencing factor (which is the rule adopted by the First Circuit in this case). The government's passing attempt to deny a conflict with *United States* v. *Graham*, 317 F.3d 262 (CADC 2003), is not a serious argument. Not only does the government acknowledge *Graham*'s holding, but this case and *Graham* are also indistinguishable on their facts. The government's further suggestion that the question presented rarely arises because the government charges drug quantity in those cases that implicate the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), is *entirely* misleading, for it omits that most Section 841 cases do *not* implicate *Apprendi*. The decision below is moreover incorrect on the merits for the reasons set forth in the petition and the excellent brief of *amici curiae* the National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, and the National Association of Federal Defenders. Certiorari accordingly should be granted.[1]

---

[1] Petitioner unsuccessfully argued below that his sentence violated *Apprendi* because it exceeded the otherwise applicable Guideline range. See Pet. App. 13a-14a. No court of appeals had accepted that argument, and it was therefore not raised by the petition for certiorari. After the petition was filed, however, the Solicitor General filed a brief in No. 02-1623, *Blakely* v. *Washington*, *cert. granted*, 124 S. Ct. 429 (2003) – which presents the question whether a sentence that exceeds a *statutory* sentencing guideline triggers *Apprendi* – explaining that a holding by this Court in favor of the defendant in *Blakely* could be equally applicable to the federal Guidelines. See Br. for the U.S., *Blakely*, at 1. Because that question is presented by the judgment in this case and was properly preserved below, the Court may deem it appropriate to hold this petition pending the disposition of *Blakely*.

I. The Circuits Are Split Over Whether Section 841(b) Defines Drug Quantity As An Element Of The Offense Or Instead As A Sentencing Factor.

The First Circuit's decision in this case conflicts squarely with D.C. Circuit precedent. In *United States* v. *Graham*, 317 F.3d 262 (2003), the D.C. Circuit – applying a line of that court's prior decisions – held that Section 841 is a "tripartite" statute, such that drug quantity "is an element of the offense" that must be presented and proved to the jury. *Id.* at 274-75.

1. The government states that "[t]here is no clear circuit conflict." BIO 6. That contention is inexplicable, if only because the Solicitor General acknowledges *Graham*'s holding both in the Opposition in this case and also in another brief in this Court. In this case, the government admits: "In [*Graham*], the court of appeals held that the district court could not sentence the defendant under Section 841(b)(1)(A) in the absence of a jury finding that his drug conspiracy offense involved the requisite threshold quantity of cocaine base." BIO 15-16. In another case, the government acknowledges *Graham*'s holding that "a defendant found guilty of a crime involving an unspecified quantity of drugs is deemed to have been found guilty of violating 21 U.S.C. 841(b)(1)(C), and *Sections 841(b)(1)(A) and (b)(1)(B) may not be relied upon in any way in imposing sentence on that verdict, including to impose a mandatory minimum sentence*." BIO, No. 03-6724, *Santana* v. *United States*, at 19-20 (citation omitted) (emphasis added).

The government's attempt to disclaim the conflict despite these frank acknowledgements lacks merit. The D.C. Circuit would reverse petitioner's sentence. Because the jury found petitioner responsible for "5 or more grams" of cocaine base, expressly rejecting a finding of "50 or more grams," Pet. App. 3a; Pet. 2; BIO 2, petitioner's case was controlled by subparagraph (B), which governs quantities of between 5 and 50 grams of cocaine base. However, the district judge rejected the jury's findings and deemed petitioner responsible

for 309.2 grams, subjecting him to subparagraph (A), which governs cases involving quantities of 50 or more grams of cocaine base. Subparagraph (A) required the judge to impose a mandatory minimum term of twenty years because that minimum term exceeded the Guideline range. U.S.S.G. 5G1.1(b) (2003).

If petitioner's sentence had been subject to subparagraph (B), pursuant to the jury's verdict, rather than subparagraph (A), his sentence would have been controlled by the Sentencing Guidelines and would have been less than twenty years. The judge would have sentenced petitioner to a Guideline range which corresponded to his finding that petitioner was responsible for 309.2 grams of drugs. Critically, however, subparagraph (A)'s twenty-year mandatory minimum would *not* have been applied because the jury's verdict would have placed the case squarely within subparagraph (B). Pet. App. 3a, 13a; Pet. 2; BIO 3. Specifically, if the judge's finding of quantity had properly been treated as a sentencing enhancement under the Guidelines, rather than an override of the jury's determination of the substantive offense, petitioner's Guideline range would have been only 168-210 months. Presentence Report ¶¶ 23, 47; BIO 3.

The D.C. Circuit would have reversed petitioner's sentence. In *Graham*, the jury was not asked to make any finding with respect to the quantity of drugs attributable to the defendant. The case was therefore controlled by subparagraph (C), which governs indeterminate amounts of cocaine base and amounts less than 5 grams. But the district judge proceeded to find the defendant responsible for 62 grams of cocaine base and, on that basis, "sentenced" the defendant under subparagraph (A), which mandates a minimum five-year term of supervised release. 317 F.3d at 266, 272. Under subparagraph (C), by contrast, the minimum term of supervised release required by the jury verdict was three years. *Id.* at 273, 275.

The D.C. Circuit reversed. The court of appeals first found no constitutional violation under *Apprendi*, since neither the defendant's 210-month prison sentence nor his five-year term of supervised release exceeded the penalties authorized by subparagraph (C). 317 F.3d at 273-75.

Having found no *Apprendi* error, however, the D.C. Circuit proceeded to hold that the district court's decision to sentence the defendant under subparagraph (A) was *forbidden by the statute*. The *Graham* court explained that, because settled D.C. Circuit precedent holds that drug quantity is an "element of the offense" that must be found by the jury, the statute does not permit the district judge to impose a sentence that rests on his or her own findings of quantity. 317 F.3d at 274. "Consequently, in light of [D.C. Circuit precedent], the district court, in sentencing Graham, could not treat subparagraphs (A) and (C) of § 841 as mere sentencing factors, and to the extent it did it erred." *Id.* at 275.

The D.C. Circuit furthermore held that the error required reversal. The five-year term, though permissible under both subparagraph (A) and subparagraph (C), was two years higher than the minimum term required under (C). See 21 U.S.C. 841(b)(1)(C). Recognizing that "the district court in sentencing Graham appears to have tracked the mandatory minimum sentencing provisions of § 841, and thus may have applied § 841(b)(1)(A), which increased Graham's supervised release period by two years," the court of appeals remanded for resentencing. 317 F.3d at 275.

In petitioner's case, the district judge erred under D.C. Circuit law by sentencing petitioner under subparagraph (A) rather than subparagraph (B). Such an error furthermore requires reversal. The twenty-year mandatory minimum term that the judge in this case deemed himself required to impose under subparagraph (A) based on his findings of drug quantity greatly exceeds the sentence to which petitioner was subject under the Guidelines based on the jury's verdict that the case was controlled by subparagraph (B).

2. There is no merit to the three arguments advanced by the government in passing to suggest that there is no conflict.

First, the government asserts without elaboration that "*Graham* did not present a pure question of statutory construction." BIO 15. To be frank, we have no idea what the government is talking about. It is certainly true that the D.C. Circuit in *Graham* considered a constitutional challenge under *Apprendi*. The relevant point, however, is that (as the Solicitor General acknowledged in his *Santana* brief) the D.C. Circuit *rejected* that constitutional challenge. See *supra* at 2, 4; 317 F.3d at 274. (Petitioner made the same constitutional argument, and lost on the same ground, in this case. See Pet. App. 14a-15a.). The D.C. Circuit, having found no constitutional violation, proceeded to rule for the defendant as a "pure [matter] of statutory construction." Contra BIO 15.

Second, the government asserts that "neither *Graham* nor the cases it relied on addressed Congress's intent in enacting the statute or otherwise applied tools of statutory construction to determine whether Section 841(b) creates offense elements." BIO 16. This is not an argument about the D.C. Circuit's holding so much as it is literary criticism. The fact that the government disagrees with the D.C. Circuit's *reasoning* does nothing to undercut the reality of that Court's *holding*. What matters for purposes of the certiorari determination is the D.C. Circuit's clear holding in a uniform line of precedents that Section 841(b)(1) defines offense elements. That holding is irreconcilable with the First Circuit's decision in this case.[2]

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[2] The government provides a "Cf." citation to a pre-*Apprendi* decision of the D.C. Circuit holding that Section 841(b)(1) sets forth sentencing factors, *United States* v. *Williams*, 194 F.3d 100 (CADC 1999), *cert. denied*, 531 U.S. 1178 (2001). See BIO 16. But the government correctly does not assert that *Williams* has precedential value any longer in the D.C. Circuit. See, *e.g.*, *United States* v. *Webb*, 255 F.3d 890, 894 (CADC 2001) (noting that *Williams* stated D.C. Circuit law "[u]ntil 2000").

The government's argument is also bad literary criticism, for the D.C. Circuit's holding is – as the petition and *amicus* brief explain at length – correct. Particularly relevant here, *no* circuit deems subparagraphs (A) to (C) to establish sentencing factors in all instances. Rather, other circuits hold that Section 841(b)(1) establishes sentencing factors when the judge's finding would cause the sentence to exceed the otherwise applicable statutory maximum. The contention that subparagraphs (A) to (C) "sometimes" set forth sentencing factors is illogical as a matter of statutory construction.

Third, the government asserts, "Although the D.C. Circuit has referred to drug quantity after *Apprendi* as an 'element,' that characterization is properly understood to mean not that Congress intended it to be an element, but that the Constitution requires that it be treated as if it were an element when an enhanced sentence is sought." BIO 17. This appears to be nothing more than a reprise of the government's erroneous claim that *Graham* turned on the need to avoid a violation of *Apprendi*. See *supra* at 5. If the government instead means that *Graham* applies when the government seeks an "enhanced sentence" that would not have been imposed under the jury's verdict, that is precisely our point. The government sought such an "enhanced sentence" in both *Graham* and this case. The D.C. Circuit invalidated the resulting sentence; the First Circuit sustained it.[3]

Because the decision below stands in square conflict with the holding of the D.C. Circuit, certiorari should be granted.

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[3] The government notes that the pre-*Graham* D.C. Circuit decisions "are consistent with" a holding that Section 841(b)(1) requires drug quantity to be an element only if the defendant's sentence would exceed the otherwise applicable statutory maximum. BIO 17. The relevant point, however, is that *Graham* is not remotely "consistent with" that reading.

II. The Question Presented Recurs Frequently.

The government professes that it is "unclear" whether the question presented has recurring significance. BIO 19. Preliminarily, we note that the government does not dispute that the question has enormous significance for many defendants previously convicted under Section 841 in cases in which, over the defendant's properly preserved objection, drug quantity was not presented to the jury.

But certiorari should be granted even if *only* prospective significance matters. Section 841 is, by far, the most frequently charged provision of the U.S. criminal code. Tens of thousands of defendants are convicted under the scheme set out in Section 841(b) *every year*. See Pet. 12. It would be stunning if the bedrock question whether so central a criminal statute sets forth elements of the offense or instead sentencing factors were less than surpassingly important.

1. The government's contrary argument rests on a false syllogism. It begins with the premise that, "in cases in which the government intends to seek an increase in the otherwise applicable statutory maximum sentence, federal prosecutors routinely assure that the threshold drug quantity needed for an enhanced sentence is charged in the indictment and submitted to the jury for determination beyond a reasonable doubt." BIO 19. The government has invoked that premise, which suggests that *Apprendi* violations are unlikely to recur in the future in federal cases, to oppose certiorari petitions presenting questions regarding whether various sentences were consistent with *Apprendi*.

But the Solicitor General would have this Court leap from this premise to the *false* conclusion that "the question whether Congress itself intended for drug quantity to be an offense element is ordinarily of little, if any, prospective importance in cases like this one, because drug quantity is being treated as if Congress *had* intended it to be an element." BIO 19 (emphasis in original). That assertion ignores the vast number of cases in which the government does not charge

quantity to the jury because the sentence it seeks is not above the subparagraph (C) maximum and therefore does not implicate *Apprendi*.

Depending on the circumstances, in a crack cocaine case, the subparagraph (C) maximum is (i) twenty years (in a basic case), (ii) thirty years (if the defendant has a prior felony conviction), or (iii) life imprisonment (in cases of death and serious bodily injury). When the government does not seek a sentence higher than this maximum under subparagraph (C) – as it does not in many cases because the Guidelines will often not permit a sentence beyond the minimum – *Apprendi* is not implicated and the government need not charge drug quantity.

Furthermore, quantity is "a[n] often hotly contested issue which must frequently be proved based on circumstantial evidence" (*United States* v. *Rigsby*, 943 F.2d 631, 643 (CA6 1991)), and which has a profound effect on the length of the sentence. For its part, the government consistently charges individual defendants with the full quantity that arguably could be attributed to them based on the acts of associates whom the government deems co-conspirators. By contrast, defendants often seek to have the question of quantity presented to the jury, which is less likely to hold defendants responsible for the attenuated acts of other individuals.

Because most cases do not involve sentences exceeding the maximum set by subparagraph (C), the government's argument "*does not apply to the vast majority of sentencing scenarios*." *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (CA11 2001) (emphasis added). Indeed, from the fact that the average sentence imposed in federal drug cases is 72.7 months (see *www.ussc.gov/judpack/2001/1c01.pdf*) and 115 months in crack cocaine cases (see *www.ussc.gov/annrpt/2001/fig-j.pdf*) – *i.e.*, well below the subparagraph (C) maximum – it is fair to conclude that the government need only charge drug quantity in a *minority* of cases.

2. Just as important, the failure to secure, and abide by, a jury finding on quantity often changes the ultimate sentence.

The judge's findings can produce dramatic differences in mandatory minimum sentences.

Assume, *just as in this case*, that a defendant with a prior qualifying conviction is responsible for either 309 grams (according to the government) or more than 5 but less than 50 grams (according to the defendant) of crack cocaine. The government generally will not charge quantity to the jury in such a case because even a judicial determination that a defendant was responsible for 300 grams would require the application of the 20-year minimum from subparagraph (A), which does not exceed the maximum sentence under subparagraph (C).[4] That is so because the applicable Sentencing Guidelines range would be lower than 20 years (see U.S.S.G. 2D1.1(c)(3), 5A (criminal history category II; offense level 34)), and statutory minimum sentences override lower Guideline ranges (see *id.* § 5G1.1(b)).

But the 20-year sentence resulting from the judge's 300-gram finding is much longer than the sentence that would result if drug quantity were treated as an element and (as in this case) the jury deemed the defendant responsible for less than 50 grams. Then, the 20-year mandatory minimum of subparagraph (A) would not apply, because the jury did not find the defendant guilty of the offense defined in that subparagraph. The sentence would instead be calculated under the Guidelines, and would be substantially lower than twenty years. See *id.* §§ 2D1.1(c)(5)-(7) (offense level 26-30). Even if the judge enhanced the Guideline range based upon his determination that the defendant possessed 309 grams, the defendant would still only be subject to imprisonment for 168-210 months. See *id.* §§ 2D1.1(c)(3), 5A (criminal history category II; offense level 34).[5]

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[4] Quantity was put before the jury in this case only because the First Circuit had not, at that time, decided the question presented.

[5] The question presented has the same prospective importance with respect to plea bargains, which resolve more than 96% of drug cases. See *www.ussc.gov/judpack/2001/1c01.pdf* (tbl 3). When the

To be sure, there is not a large body of appellate case law presenting this scenario. But the explanation is simple: in every circuit except the D.C. Circuit, quantity is generally not put before the jury, so that the judge never has cause to override the jury's determination. In the D.C. Circuit itself, *Graham* prohibits the judge from overriding the jury. Thus, the conflict is sufficiently fixed that there is *no* circuit in which cases would regularly emerge in which, as here, the judge overrode the jury's findings. But that does not in any respect undercut the importance of the question presented, for in *many* cases, if quantity *were* put before the jury, the verdicts would regularly preclude the imposition of mandatory minimum sentences under subparagraphs (A) and (B). See *supra* at 8.

3. The government also identifies a further category of cases in which the question presented will arise in the future: those in which the defendant pleads guilty but contests drug quantity. BIO 19-20 n.7. The fact that few appellate cases have been decided in that circumstance does not mean that they have not arisen in the district courts, as such cases are most often resolved without appeals, and manifestly does not mean that they will not arise in the future. To defer review now, when it is clear that the question will continue to arise, would invite an ever-increasing number of retroactivity claims that will serve only to burden the federal courts. See Pet. 13-14. Principles of sound judicial administration thus counsel in favor of granting certiorari now.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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quantity alleged by the government will not produce a sentence in excess of the subparagraph (C) maximum, the judge's finding of quantity after accepting the plea will frequently trigger a mandatory minimum under subparagraphs (A) or (B).

Respectfully submitted,

Peter Rodway
William Savage
RODWAY & HORODYSKI
P.O. Box 874
Portland, ME 04104

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

February 18, 2004[6]

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[6] Counsel for petitioners were assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate and Eric J. Feigin.

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(2)

No. 03-596

IN THE

Supreme Court of the United States

BRIAN GOODINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS W. DUNHAM
Counsel of Record
ELLEN P. QUACKENBOS
4 Times Square
New York, NY 10036
212 735-3000

Attorneys for Amici Curiae National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums Foundation, and National Association of Federal Defenders

(*Additional Counsel Listed on Inside Cover*)

MARY PRICE
General Counsel
FAMILIES AGAINST MANDATORY
MINIMUMS FOUNDATION
1612 K Street, N.W., Suite 700
Washington, D.C. 20006
202-822-6700

DAVID M. PORTER
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
801 I Street, 3rd Floor
Sacramento, CA 95814
916-498-5700

CAROL BROOK
President
NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
FEDERAL DEFENDER PROGRAM, INC.
5 East Monroe Street, Suite 2800
Chicago, IL 60603
(312) 621-8300

DAVID MCCOLGIN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
DEFENDER ASSOC. OF PHILADELPHIA,
FED. CT. DIV.
The Curtis Center, Suite 540W
Philadelphia, PA 19106
(215) 928-1100

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with more than 10,000 attorney-members nationwide and 80 state and local affiliate organizations with 28,000 members in all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts.

Amicus curiae Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization with 28,000 members and 44 chapters nationwide. FAMM conducts research, promotes advocacy, and educates the public regarding the excessive financial and social cost of mandatory minimum sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities and disproportionate sentences. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime and the culpability of the offender. FAMM therefore has a special interest in ensuring that sentencing law and practice result in just outcomes and that sentences be arrived at in a manner consistent with statutory and constitutional mandates.

Amicus curiae National Association of Federal Defenders (NAFD) is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment of the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief, and copies of those consents have been filed with the Court.

defendants in the criminal justice system is adequately represented. A large percentage of the clients served by NAFD members are charged under 21 U.S.C. § 841, the statute at issue in this case.

Amici have a strong interest in issues affecting defendants charged under section 841. The question presented in this case by the Petition for Certiorari, whether under section 841 drug quantity is an element of the offense or instead a sentencing factor, is in urgent need of resolution by this Court, given the uncertainty and confusion on this question in the lower courts and given the very significant effect that judicial fact-finding can have on the sentences meted out to drug offenders. *Amici* believe that this brief will assist the Court in evaluating the issues of statutory interpretation raised by the Petition and the constitutional implications of these issues, as well as provide perspective on the practical consequences of these issues for the courts, defendants, and the criminal justice system.

SUMMARY OF ARGUMENT

The Petition for Certiorari in this case presents the exceptionally important question of whether the threshold drug quantities set forth under 21 U.S.C. § 841 are elements of separate offenses, or are merely sentencing factors. In affirming Petitioner's sentence in this case, the United States Court of Appeals for the First Circuit held that the statutory threshold drug quantities are not elements of the offense, but are sentencing factors to be determined by the trial judge under a preponderance of the evidence standard. Under the First Circuit's interpretation, the key factual determinant of the severity of the sentence is not required to be submitted to the jury and is not subjected to a requirement of proof beyond a reasonable doubt. The interpretation given section 841 by the First Circuit is incorrect as a matter of statutory construction and raises serious constitutional issues regarding the Sixth Amendment right to a jury trial and the due process requirement that all the elements of the crime be proved beyond a reasonable doubt.

Amici submit that the threshold drug quantities established in section 841 should properly be construed as elements of the offense, not as sentencing factors. This result is com-

pelled both by the language and structure of section 841 and by its legislative history, as well as by the historic understanding of the role of quantities and/or value as elements in drug and other crimes. Furthermore, the doctrine of constitutional doubt requires that the statute be interpreted so as to avoid the serious constitutional questions raised by First Circuit's treatment of drug quantities under section 841 as sentencing factors.

This Court should grant certiorari and resolve this issue now rather than later. At present, conflicting approaches among the United States Courts of Appeals have created significant confusion and difficulties with regard to when and what factual determinations under section 841 must be proved to the jury beyond a reasonable doubt. The D.C. Circuit interprets section 841 as establishing multiple offenses, with drug quantity an element. *See Graham v. United States*, 317 F.3d 262, 274 (D.C. Cir. 2003). Under the interpretation of drug quantities as sentencing factors, which has been adopted by a number of other circuits, including the First Circuit, drug quantity must sometimes be determined by the jury beyond a reasonable doubt and sometimes not, depending upon the circumstances of the case and upon the particular court's interpretation and application of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In a third and novel approach, the Seventh Circuit has held that in drafting section 841, Congress, by failing to specify whether drug quantities were sentencing factors or elements, intentionally "l[eft] it to the judiciary to sort out who determines what facts, under what burden." *United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir. 2001). *See generally* Pet. at 9-10.

Requiring a jury determination as to the threshold drug amounts set forth in section 841 and recognizing drug quantity as an element of the offense would result in a uniform rule of easy application. Moreover, adopting such as statutory interpretation will not result in a material increase in the workload of the trial courts. It is already the practice of federal prosecutors in many jurisdictions to charge drug type and quantity in indictments and to present that issue to the jury. *See United States v. Vazquez*, 271 F.3d 93, 114 (3d Cir. 2001) (en banc) (Becker, J., concurring) (noting that "[s]ince *Apprendi*, federal district courts have . . . submitt[ed] special

interrogatories to the jury for determination of drug type and quantity"), *cert. denied*, 536 U.S. 963 (2002). Indeed, the issue of drug quantity was submitted to the jury in this case, but the district court, applying a preponderance standard, determined that a larger amount than found by the jury was involved in the offense, resulting in the doubling of Petitioner's sentence.

Interpretation of the threshold drug quantities in section 841 as elements of the offense would eliminate anomalous and unfair results such as occurred in the present case. It would also simplify and/or eliminate the recurrent issues presented under section 841 on appeal under *Apprendi*. Treatment of drug quantity as an element of the offense will result in a fairer administration of the nation's drug laws and will accord with the intent of Congress in enacting section 841. For these reasons and the reasons set forth below, *amici* respectfully urge the Court to grant the Petition for Certiorari.

ARGUMENT

I. This Court Should Grant Certiorari and Clarify Whether the Threshold Drug Quantities Set Forth in Section 841(b) Are Offense Elements, Rather Than Merely Sentencing Factors

A. The Statutory Language and Structure Establish That Drug Quantities under Section 841(b) Were Intended As Elements Defining Separate Offenses

The First Circuit in this case incorrectly held that subsection (a) of 21 U.S.C. § 841 defines the elements of a single generalized offense of unlawfully distributing, manufacturing or dispensing a controlled substance and that the drug quantities set forth in subsection (b) are merely sentencing factors, subject to judicial fact-finding under a preponderance standard. *Amici* submit that the content, structure and wording of section 841 compel the conclusion that subsection (a) lists elements common to offenses of manufacturing, distributing and dispensing controlled substances, while subsection (b) establishes multiple separate specific offenses based upon the additional elements of drug type and quantity.

The wide range of penalties provided for by subsection (b) for offenses involving different quantities of different drugs

evidences Congress's intent to make drug quantity an element of the offense. Subsection (b) not only authorizes penalties ranging from probation to life imprisonment, but also establishes widely different maximum penalties for violations involving different quantities and/or types of drugs. Those penalties include a one-year maximum under section 841(b)(3), a three-year maximum under section 841(b)(2), a five-year maximum under section 841(b)(1)(D), a 20-year maximum under section 841(b)(1)(C), a 40-year maximum under (b)(1)(B), and a maximum of life under (b)(1)(A). The different violations possible under section 841(b) range from misdemeanor (section 841(b)(3)) to "serious drug offense" (section 841(b)(1)(A)). *See* 18 U.S.C. § 3559. Even with respect to the same drug type, penalties can vary significantly. *Compare, e.g.*, § 841(b)(1)(B)(vii) (providing a maximum of 40 years imprisonment for a violation involving "100 kilograms or more of a mixture or substance containing a detectable amount of marijuana") *with* § 841(b)(1)(D) (providing a maximum of 5 years imprisonment "in the case of less than 50 kilograms of marijuana"). As Judge Becker of the United States Court of Appeals for the Third Circuit has concluded, these "dramatic differences in the severity of punishment . . . signal Congress's intent to make drug type and quantity elements of the several offenses established under § 841." *Vazquez*, 271 F.3d at 113 (concurring opinion).

In *Jones v. United States*, 526 U.S. 227 (1999), this Court looked to the wide variations in penalties under the federal carjacking statute in determining that the subsections of that statute establish three separate offenses. The Court emphasized that the subsections at issue provided "steeply higher penalties" and "condition[ed]" those steeply higher penalties upon "further facts." *Jones*, 526 U.S. at 233. The Court reasoned that it was questionable that Congress would have intended that the "specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, . . . carry none of the [due] process safeguards that elements of an offense bring with them for a defendant's benefit." *Id.*; *see also Castillo v. United States*, 530 U.S. 120, 131 (2000) ("the length and severity of an added mandatory sentence . . . weighs in favor of treating such offense-related words as referring to an element"). Like the carjacking statute at issue in *Jones*, section 841 provides for wide variations in sentencing

and conditions "steeply higher" penalties upon further facts, namely the amount and type of drug involved. As in *Jones*, these considerations support the conclusion that Congress intended subsection (b) of section 841 to establish separate offenses defined by the elements of drug type and amount.

Contrary to the First Circuit's conclusion in this case, section 841(b) does not establish "a typical sentencing scheme." Pet. App. at 12a. Indeed, the range of penalties provided by section 841 -- probation to life imprisonment -- is not what is commonly understood to be a "sentencing range" at all. A sentencing range is commonly understood to be "limits fixed by law" within which a judge traditionally may exercise discretion "to determine the type and extent of punishment." *Apprendi*, 530 U.S. at 481-82. A range from probation to life imprisonment does not in fact limit judicial discretion. Section 841 establishes a typical sentencing scheme only if the various subparagraphs under section 841(b) are construed as setting separate sentencing ranges for separate, specifically defined offenses, the seriousness of which is measured by the elements of quantity and type of drug involved.

Further evidence of Congress's intent to establish separate offenses based on the elements of drug type and quantity is provided by the structure and wording of the relevant subsections under section 841(b). Each of these subsections has a two-part structure typical of complete criminal statutes, *i.e.*, a separate clause that defines the offense followed by sentencing provisions. For example, subparagraph (b)(1)(A) defines an offense that incorporates the elements of a violation of subsection (a) and "involv[es]" the additional elements of drug type and quantity as set forth in separately numbered subclauses (b)(1)(A)(i) to (viii).[2] Significantly, under the language of subparagraph (A) ("in the case of a violation . . . involving – (i) 1 kilogram or more . . ."), the drug types and quantities set forth in (i) to (viii) are grammatically linked to and describe the defendant's "violation." 21 U.S.C. §

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[2] *Cf. Castillo*, 530 U.S. at 124 (interpreting statutory language as "incorporating by reference the initial phrases that relate the basic elements of the crime and creating a different crime containing one new element, i.e., the use of carrying of a 'machinegun' during and in relation to a crime of violence").

841(b)(1)(A). The described violations are then followed by sentencing provisions set forth in unnumbered text beginning "such person shall be sentenced . . . ." *Id.* As is often the case in federal criminal statutes, the sentencing provisions are placed after the word "shall" and the elements of the violation precede the word "shall." *See Jones*, 526 at 233; *Harris v. United States*, 536 U.S. 545, 552 (2002).

Confirming that the first portion of subparagraph (b)(1)(A), with its numbered subclauses, is intended to set forth elements of the offense is the reference in the second portion of the subparagraph to "a violation of this subparagraph." That language is incompatible with the notion that the subparagraph merely sets forth sentencing factors. Rather, by referring to "a violation of this subparagraph," the subparagraph itself confirms that its function is to define a particular offense.

Subparagraph (b)(1)(B) has a structure identical to that of (b)(1)(A). Subparagraphs (b)(1)(C) and (D), as well as (b)(2), (3), (4), are similarly divided between initial phrases that set forth drug type and/or quantity so as to define a specific type of violation of subsection (a), and concluding clauses that set forth sentencing ranges.[3] Subparagraph (b)(1)(D), for example, begins with the offense-defining phrase "[i]n the case of less than 50 kilograms of marihuana . . . ," and sets forth the applicable penalties in language beginning, "such person shall . . . be sentenced to a term of imprisonment . . . ."

Moreover, although subsection (a) is a complete grammatical sentence, it is not a complete definition of a crime. As one legal scholar has stated:

What we mean by "crime" or an "offense" is simply

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[3] Significantly, the structure of these provisions is similar to that of 21 U.S.C. § 860(a), which provides for a greater penalty for persons who violate section 841 within 1000 feet of a school. Section 860(a), which is given the heading "Penalty," has uniformly been held to define an offense, and the defendant's location within 1000 feet of a school has uniformly been held to be an element that must be proved to the jury beyond a reasonable doubt. *See United States v. Harris*, 313 F.3d 1228, 1238-39 (10th Cir. 2002) (citing cases), *cert. denied*, 537 U.S. 1244 (2003).

> conduct that is forbidden by law and to which consequences, called punishment, will apply on the occurrence of stated conditions and following a stated process. *A crime is not merely any conduct forbidden by law; it is forbidden conduct for which punishment is prescribed* and which is formally described as a crime . . . .

Herbert Packer, *The Limits of the Criminal Sanction* 18 (1968) (emphasis added).[4] Section 841(a) merely declares certain general conduct unlawful.[5] Accordingly, subsection (a) "alone does not define a complete offense because it includes no punishment." *Vazquez*, 271 F.3d at 112 (Becker J., concurring). The statute contains no basic penalty or catchall minimum. Hence, "[a] jury verdict finding only that the defendant had committed the acts described in subsection (a), without more, would not render the defendant guilty of a crime requiring any ascertainable punishment." *Id.* It is only subsection (b) that defines particular categories of conduct as crimes and sets the range of penalties applicable to each.[6]

Some United States Courts of Appeals, in holding that drug quantities under section 841(b) are sentencing factors,

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[4] Indeed, it is black-letter law that a prohibition without a specified penalty does not create a crime. *See, e.g.*, Wayne R. LaFave, *Criminal Law* § 1.2(d), at 12-13 (4th ed. 2003) ("[A] crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.").

[5] Section 841(a)'s prohibition is enforceable not only through criminal penalties, but through injunctive proceedings. *See, e.g., United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

[6] In contrast, subsection (a) of 8 U.S.C. § 1326, the statute examined by this Court in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), both defines the offense *and* prescribes penalties, thus facilitating the conclusion that subsection (b) of section 1326 merely sets forth *additional* penalties based upon the sentencing factor of recidivism. *See Almendarez-Torres*, 523 U.S. at 230-31. Likewise, subsection (i) of 18 U.S.C. § 924(c)(1)(A), the statute at issue in *Harris*, also sets forth a minimum sentence for the basic offense, supporting the interpretation that subsections (ii) and (iii), which increase the minimum penalty if certain facts are present, contain sentencing factors, not elements. *See Harris*, 536 U.S. at 552-53. The fact that, unlike these statutes, section 841 contains no basic penalty or catchall minimum supports the conclusion that section 841(b) sets forth different violations with different elements.

have erroneously relied upon the headings "Unlawful Acts" and "Penalties" that appear in section 841 in the United States Code. *See, e.g., United States v. Lewis*, 113 F.3d 487, 489-91 (3d Cir. 1997); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991); *United States v. Moreno*, 899 F.2d 465, 471-74 (6th Cir. 1990); *see also United States v. Promise*, 255 F.3d 150, 170-71 (4th Cir. 2001) (Luttig, J., concurring). These headings, however, were not part of the statute as enacted by Congress, but "can be traced to the Office of the Federal Register, National Archives and Records Services, which added a reference to 'penalties' as a margin note to the predecessor of § 841(b) in the Statutes at Large simply for user convenience." *Vazquez*, 271 F.3d at 111 (Becker, J., concurring). When the Controlled Substances Act was reproduced in the United States Code, "the margin notes were converted into subsection headings by the codification committee, but have never been officially adopted by the Congress." *Id.*

Indeed, even if Congress itself had officially adopted the headings in section 841, judicial reliance upon them to hold that drug quantities and types are merely sentencing factors would be misplaced. As two legal scholars have stated with particular reference to section 841,

> [t]he insertion into some statutes of the word "penalties," in conjunction with the *McMillan* ruling, has led the circuits to conclude that all factual findings within "penalty" provisions are to be decided by the district court at sentencing. In fact, much like the Pennsylvania legislature declaring in the body of the statute itself that visible possession of a weapon is not an element of the offense, the courts have concluded that Congress has, by placing quantity determinations in the penalty section, accomplished the same thing without resorting to such explicit language. This seems clearly wrong – surely it is not too much to ask Congress to be explicit when serious additional penalties are at stake, particularly since traditional interpretation would mandate a contrary result.

Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 22 Seattle Univ. L. Rev. 1057,

1095-96 (1999) (footnotes omitted).[7]

Judge Luttig of the Fourth Circuit has argued that section 841 establishes a single offense with a statutory maximum penalty of life imprisonment and that accordingly there can never be an *Apprendi* problem because application of drug quantity and type as sentencing factors will never will result in a penalty in excess of that statutory maximum. *See Promise*, 255 F.3d at 169-70 (Luttig, J., concurring). Judge Luttig's concurrence bluntly states the logical consequences of interpreting the drug quantities and types set forth in subsection (b) as sentencing factors. That reasoning, however, in fact highlights the impossibility that such an interpretation could be correct. Judge Luttig offers no other example of a statute that purportedly sets intermediate sentencing categories ranging from "not more than one year" for a misdemeanor drug offense, § 841(b)(3), to up to life imprisonment, conditioned on factual findings to be made by the sentencing judge, and *amici* know of no such statute. The "single offense" interpretation of section 841 supposes that Congress intended to do something it has never done before or since.[8]

In any case, the interpretation of section 841 as setting forth a single offense with a single overall sentencing range is a tortured reading of the statute. In fact, the statute sets forth a separate sentencing range, specifying both minimum and maximum sentences for each of the violations described in its subsections. Thus, for example, a violation "involving" 100 grams or more of heroin is subject to a minimum of 5 years imprisonment, and a maximum of 40 years, while a violation involving less than 50 kilograms of marihuana is subject to imprisonment for a term of "not more than 5

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[7] *Cf.* 21 U.S.C. § 860(a), which is headed "Penalty," but which has uniformly been held to define both the offense and the basic penalty. *See* n.3 *supra*.

[8] Moreover, the maximum penalty of life imprisonment is simply not available under the statute for every violation of subsection (a). Life is the maximum statutory penalty only for certain violations of subsection (a). There is little sense or meaning in asserting that under the statute life imprisonment is somehow theoretically the maximum penalty available for distributing, *e.g.*, less than 50 kilograms of marijuana or of a controlled substance in schedule V, when the statute clearly sets maximum penalties of five years and one year respectively.

years." 18 U.S.C. § 841(b)(1)(B) & (D). The statute provides no possibility for a life term in such cases. The statute's establishment of multiple sentencing ranges – as opposed to a series of increased minimums within an overall basic sentencing range, such as was at issue in *Harris* – supports an interpretation of the statute as setting forth different offenses, with separate additional elements.

In its decision in this case, the First Circuit, relying upon Judge Luttig's concurrence in *Promise*, opines that if section 841(b) is interpreted as defining separate offenses based on elements of drug type and quantities, the statute "would define as many as 350 different offenses." Pet. App. at 12a. According to the First Circuit, such an interpretation would somehow cause some unspecified practical "difficulty we think Congress did not intend." *Id.* Since drug types and threshold quantities are already routinely charged and submitted to the jury, *see Vazquez*, 271 F.3d at 114 (Becker, J., concurring), it is clear that no practical difficulty would result. Moreover, most drug types are not treated individually by section 841(b), but are referenced according to their grouping under five "schedules" initially set forth in 21 U.S.C. § 812 and refined from time to time in 21 C.F.R. § 1308.11 *et seq.* Indeed, one of Congress's primary purposes of section 841 was to simplify and consolidate the "plethora" of federal drug laws governing distributing and manufacturing offenses. *See Vazquez*, 271 F.3d at 108-09 (Becker, J. concurring). This goal was accomplished, however, not by establishing a single general offense, but by setting forth the elements common to all such offenses in subsection (a), and grouping offenses on a "double axis" of the additional elements of drug types and quantities in the various subparagraphs of subsection (b). *See id.* at 108-09. Under that relatively simple system, no "difficulty" is caused by holding that drug types and quantities are separate elements.[9]

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[9] The simultaneous possession of two types of drugs has uniformly been held to constitute two separate offenses for double jeopardy and other purposes. *See, e.g., United States v. Garcia-Rosa*, 876 F.2d 209, 216-17 (1st Cir. 1989); *United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986).

B. The Traditional and Statutory Context of Section 841 Shows That Drug Quantity Is an Element of the Offense, Not a Sentencing Factor

A statute's "context" is also relevant to the determination of its meaning. *See Almendarez-Torres*, 523 U.S. at 228. The traditional and statutory context of section 841 supports interpreting drug quantity as an element of the offense, not a sentencing factor. Traditionally, amounts and values set forth in analogous criminal statutes such as those governing larceny and liquor sales were deemed elements of the offense. Furthermore, the interrelationship established by Congress between section 841 and certain other federal criminal statutes demonstrates Congress's intent to make drug quantities elements of separate offenses under section 841(b).

In its interpretation of section 841 in this case, the First Circuit, citing the federal sentencing guidelines, relied on the erroneous notion that drug quantity is a "classic" sentencing factor. Pet. App. at 11a. In fact, drug statutes themselves are a creation of the modern era, and, in any case, state drug laws typically treat threshold drug quantities as elements.[10] Moreover, drug quantities under the Controlled Substances Act are analogous to threshold quantities and values in other federal and state statutes, which historically have been treated as elements of the offense and required to be submitted to the jury and proved beyond a reasonable doubt. *See generally* Knoll & Singer, *supra*, at 1067-79.

For example, the Jones Act, as amended in 1931, included a proviso that made a violation of the National Prohibition

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[10] *See, e.g.*, Ala. Code § 13A-12-231(2); *Ex parte Washington*, 818 So. 2d 424 (Ala. 2001) ; Ariz. Rev. Stat. § 13-3405(B); *Arizona v. Virgo*, 947 P.2d 923 (Ariz. Ct. App. 1997); Del. Code Ann. tit. 16, § 4753A; Ga. Code Ann.§ 16-13-31; *Mallarino v. State*, 379 S.E.2d 114 (Ga. App. 1990); Idaho Code § 37-2732B; *State v. Portillopayan*, 977 P.2d 228, 231 (Idaho Ct. App. 1998); 720 IlCS 570/401; *People v. Harper*, 482 N.E.2d 312 (Ill. App. Ct. 1985) ("Where the grade of the offense depends on the amount of the drug involved . . . then the amount possessed by a defendant becomes an essential element of the offense"); Burns Ind. Code Ann. § 35-48-4-1; *Hall v. Indiana*, 403 N.E.2d 1382, 1390 (Ind. 1980); Iowa Code § 124.401; KRS § 218A.1421. *Cf. Jones*, 526 U.S. at 236-37 (looking to "state practice" in distinguishing between elements and sentencing factors).

Act by a sale of not more than one gallon of an alcoholic beverage punishable by a sentence not to exceed six months, while a violation that involved more than one gallon was punishable by five years in prison. *See id.* at 1071-72. Under these provisions, it was held that the fact that more than one gallon of liquor was involved was an "essential element[] of the offense." *E.g., Pace v. Aderhold*, 2 F. Supp. 261, 263 (N.D. Ga. 1932), *aff'd*, 65 F.2d 790 (5th Cir. 1933); *see also Olivito v. United States*, 67 F.2d 564, 565 (9th Cir. 1933). This federal precedent is in accord with traditional practice under earlier state laws criminalizing the sale of liquor. When such statutes "ma[d]e the offense or punishment vary with the quantity sold," it was necessary to allege and prove quantity. *See* J. Bishop, *Statutory Crimes* §§ 1039, 1047 (3d ed. 1901) (citing cases).

Likewise, under larceny and embezzlement statutes providing for sentences based upon the value of the property at issue, value was considered a "'material element of the offense charged'" such that "'it must not only be alleged, but like all other statutory elements defining the crime, it must be proved by competent evidence to the satisfaction of the jury beyond a reasonable doubt.'" Knoll & Singer, *supra*, at 1074-75 (quoting *Henry v. United States*, 263 F. 459, 461 (D.C. Cir. 1919)). Thus, the traditional "rule pervading the entire procedure in larceny is that the value of the thing stolen must be alleged and proved when the punishment or its degree depends on value." Bishop, *Statutory Crimes* § 427. Such statutes provide the traditional precedent for section 841.

The interaction of section 841 with other federal statutes also confirms that drug quantities under section 841 function as traditional elements, defining levels of offenses. In particular, a prior conviction under section 841(b)(1)(A) -- the most serious of the drug violations defined in 841(b) – may result in enhanced penalties if a defendant is later convicted under another federal statute. For example, under the "three strikes" law, a person convicted under federal law of a serious violent felony shall be sentenced to life imprisonment, if he or she has earlier been convicted of "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. § 3559(c)(1)(A)(ii). For this purpose, a "serious drug

offense" includes an offense punishable under section 841(b)(1)(A). 18 U.S.C. § 3559(c)(2)(H). For a prior conviction to be used in this way, "an earlier factfinder (e.g., a unanimous federal jury in the case of a federal crime) [must have] found that the defendant in fact committed that earlier individual crime." *Richardson v. United States*, 526 U.S. 813, 822 (1999). Thus, section 3559 clearly contemplates that the drug quantity necessary to constitute a violation under section 841(b)(1)(A) will have been proved beyond a reasonable doubt to the jury.

Similarly, prior convictions under section 841 "for which a maximum term of imprisonment of ten years or more is prescribed by law" may result in enhanced penalties if the defendant is later convicted of a violation of 18 U.S.C. § 922(g). *See* 18 U.S.C. § 924(e). Again, under *Richardson*, for this provision to be operative, the facts (i.e., drug type and quantity) that suffice for a maximum term of ten years or more under section 841 must have been proved to a jury beyond a reasonable doubt. Thus, the consequences Congress has prescribed for certain prior convictions under section 841 demonstrate Congress's intention to establish multiple separate offenses based upon the elements of drug type and quantity.

The First Circuit in this case erroneously concluded that if it ruled that the threshold drug quantities listed in section 841(b)(1)(A)-(C) constituted elements, it "would essentially abolish the [federal sentencing guidelines] because the jury would be required to make findings as to all facts that may be relevant to sentencing ranges and potential adjustments." Pet. App. 15a. To the contrary, Congress' use of threshold drug quantities as statutory elements of drug offenses does not preclude concomitant use of drug quantities as sentencing factors under the sentencing guidelines.[11] Indeed, drug quantities under the federal sentencing guidelines are calibrated so as to mesh precisely within the larger quantity

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[11] In any event, the views of the United States Sentencing Commission cannot change the meaning of a Congressional enactment. *See Neal v. United States*, 516 U.S. 284, 291-95 (1996).

ranges set forth in section 841.[12] Accordingly, the statute and guidelines function together, with the statute setting forth threshold drug quantities that are necessary elements of the offense, and the guidelines making finer distinctions within the larger statutory gradations.[13] Moreover, in contrast to the large gradations in threshold drug amounts in section 841(b), the "incremental" gradations in the sentencing guidelines "are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *See Harris v. United States*, 536 U.S. 545, 554 (2002). Thus, the fact that the federal sentencing guidelines define base offense levels for drug violations by reference to drug quantities does not support the argument that the drug amounts set forth in section 841(b) are only sentencing factors and not elements of the offense. Contrary to the First Circuit's assertion, a statutory interpretation of section 841(b) as establishing drug quantity and type as elements of different levels of offenses would not disrupt the functioning of the federal sentencing guidelines. Rather, the jury's finding as to drug quantity would simply confine the sentencing judge's factual findings to the "finer" guideline quantity ranges applicable to the offense of which a defendant had been convicted.

In short, far from "abolishing" the guidelines, under the

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[12] For example, with regard to violations involving cocaine base, section 841(b)(1)(A) applies to amounts of 50 grams or more. Within offenses under section 841(b)(1)(A), the federal sentencing guidelines distinguish between (i) at least 50 grams of cocaine base but less than 150, (ii) at least 150 grams but less than 500, and (iii) at least 500 grams but less than 1.5 kilogram. *See* U.S.S.G. § 2D1.1. Similarly, section 841(b)(1)(B) applies to amounts of cocaine base from at least 5 grams to less than 50. Within offenses under that subsection, the federal sentencing guidelines distinguish between (i) at least 5 grams but less that 20, (ii) at least 20 grams but less than 35, and (iii) at least 35 grams but less than 50. *See id.*; *see also id.*, Commentary, "Background" (stating that "[t]he base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute," but provide "finer distinctions").

[13] Significantly, the Guidelines themselves expressly contemplate that a defendants are "convicted under" the various subparagraphs of section 841(b)(1)(A), (B), and (C), and specifically treat "death or serious bodily injury" resulting from an offense under those subparagraphs not as an "offense characteristic" but as something that must be established by the "offense of conviction." *See* U.S.S.G. § 2D1.1(a).

interpretation of section 841 urged by Petitioner and *amici*, the statute would operate together with the guidelines. The statute would define various levels of offenses based on threshold quantities, and the guidelines would permit a sentencing judge to make finer factual determinations by a preponderance of the evidence as to actual drug quantity, consistent with the statutory threshold amount found by the jury. Moreover, such an interpretation of section 841 accords with traditional categories of "elements" and with the relationship between section 841 and other criminal statutes.

C. The Legislative History of Section 841 Shows That Drug Quantity Is an Element of the Offense

The legislative history of section 841 confirms that it is correct to interpret threshold drug quantities as offense elements. The legislative history of section 841 contrasts markedly with the legislative history of 8 U.S.C. § 1326, described by this Court in *Almendarez-Torres*. In that case, this Court held that, under section 1326, a defendant's prior felony convictions were merely sentencing factors and not elements of the crime of illegal reentry to the United States following a previous deportation. The legislative history of section 1326, as described by this Court, was entirely devoid of any indication that prior felony convictions were meant to be anything other than sentencing factors. Indeed, this Court emphasized the fact that the legislative history of that statute "speaks about, and *only about*, the creation of new penalties" and "contains no language at all" indicating that Congress intended to create separately defined substantive crimes. *Almendarez-Torres*, 523 U.S. at 234 (emphasis added).

Unlike the legislative history of section 1326, the legislative history of section 841 contains numerous instances of language indicating that Congress understood that different drug types and different threshold drug quantities defined different substantive offenses. *See Vazquez*, 271 F.3d at 109-10 (Becker, J., concurring). For example, in 1980 when Congress amended the statute to include provisions relating to the quantity of marijuana involved in an offense, both the House and Senate Reports reflect that Congress intended quantity to function as an element with respect to marijuana offenses. The Reports state: "Individuals *convicted* of trafficking in over 1,000 pounds would be subject to a maximum

15 year prison sentence . . . " H.R. Rep. No. 96-936, at 13 (1980) (emphasis added); S. Rep. No. 96-916, at 14 (1980) (emphasis added). In 1984 when Congress amended section 841 to account for drug quantity for controlled substances other than marijuana, the Senate Report indicates that Congress created "a new subparagraph (A) under section 841(b)(1) that would provide, for *offenses* involving large amounts of particularly dangerous drugs, higher penalties than those now provided under section 841." S. Rep. No. 98-225, at 258 (1983) (emphasis added). As Judge Becker stated, the "use of the plural 'offenses' indicates Congress's intention to create within the single statute a multitude of separate crimes depending on drug type and quantity. " *Vazquez*, 271 F.3d at 110 (Becker, J., concurring).

In 1986 when Congress amended section 841 to create separate subparagraphs (A) and (B) under section 841(b)(1), and to include mandatory minimum sentences under those subparagraphs, the legislative history indicates that Congress understood that prosecutors would be required to introduce evidence of drug quantity during trial in order to obtain a conviction. *See id.* (citing H.R. Rep. No. 99 -845, at 12 (1986) (Congress had been informed by U.S. Attorneys that they would be able to meet the evidentiary burden for proving quantity to the jury)). Moreover, like the 1980 House and Senate Reports, the 1986 House Report specifically refers to persons "convicted under" subparagraphs (b)(1)(A) and (B), again indicating the Congressional understanding that those subparagraphs set out separate substantive offenses. *See* H.R. Rep. No. 99-845, at 12 (1986). It can be presumed that Congress was aware of the legal distinction between the phrases "convicted under" and "sentenced under" and would have used the latter had it meant drug quantity and type to be sentencing factors, rather than elements of substantive offenses. *See Vazquez*, 271 F.3d at 110 (Becker, J., concurring).

In short, the legislative history contains definite and repeated indications that Congress intended the threshold drug quantities specified under section 841(b) to be elements of particular offenses. The legislative history contains no such

indications,[14] much less any express statement, that Congress intended drug quantities to function as sentencing factors to be decided by the sentencing judge under a preponderance of the evidence standard.

II. The Canon of Constitutional Avoidance Requires Interpreting the Drug Quantities in Section 841 as Elements Defining Separate Offenses

It is a "cardinal principle" of federal statutory construction that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Jones*, 526 U.S. at 239. *Amici* respectfully submit that this principle of statutory construction requires the drug types and threshold drug amounts set forth in section 841(b) to be treated as elements of the offense.

Under this Court's constitutional jurisprudence, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum,' whether the statute calls it an element or a sentencing factor, 'must be submitted to a jury and proved beyond a reasonable doubt.'" *Harris*, 536 U.S. at 550 (quoting *Apprendi*, 530 U.S. at 490). Under that standard, there are indisputably instances in which it is unconstitutional to treat the drug

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[14] The First Circuit points to the fact that, when section 841 was first enacted in 1970, the House Conference Report referred to the sentencing procedures as giving "maximum flexibility to judges." Pet. App. at 11a. Section 841 as passed in 1970 contained no drug quantities, but set possible penalties solely in accordance with the type of controlled substance involved in the violation. The reference to "maximum flexibility" appears to refer to the fact that the statute permitted a judge to impose either fines or prison terms (with no statutory minimums) or both, abolishing the prior mandatory sentences. *See Warden v. Marrero*, 417 U.S. 653 (1974) (describing pre-1971 federal drug sentencing); *see also* 18 U.S.C. § 841(b) (1970). Contrary to the First Circuit's assertion, the phrase quoted from 1970 legislative history sheds no light on Congress's intent in amending the statute more than a decade later to include drug quantities.

types and amounts set forth in section 841(b) as sentencing factors, because such sentencing factors would impermissibly "swell the penalty" above the maximum provided for the acts proved to the jury beyond a reasonable doubt. *Id.* at 561-62. Under *Jones* and *Apprendi*, an interpretation of the drug amounts and drug types set forth in the statute as sentencing factors is subject to grave constitutional doubt

In *Jones*, this Court looked to the doctrine of constitutional doubt in holding that the federal carjacking statute, 18 U.S.C. § 2119, set forth basic and aggravated offenses, distinguished by the elements of "serious bodily injury" and "death." 526 U.S. at 239. In refusing to interpret "serious bodily injury" and "death," as mere sentencing factors, the Court stated

> If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.

Id. at 243-44. The same serious constitutional doubt raised in *Jones* exists if drug amounts under section 841 are treated as mere sentencing factors. Under section 841, a jury finding of fact necessary for a maximum five year sentence – namely a violation involving less than 50 kilograms of marihuana under section 841((b)(1)(D) – would open the door to judicial factfinding sufficient for a sentence of 40 years or life under subsections (b)(1)(B)(vii) (100 kilograms or more of marijuana) and (b)(1)(A)(vii) (1000 kilograms or more).

Under *Jones*, the fact that section 841 contemplates such increases in the maximum sentence available based upon drug quantity requires that the statute be interpreted as setting forth separate offenses based upon the elements of drug type and quantity. Because it is not reasonable to suppose that Congress intended some drug quantities under the statute to be elements and others to be sentencing factors, the doctrine of constitutional doubt requires that all drug quantities under the statute be interpreted as elements.

Moreover, such an interpretation accords with the traditional understanding of the "constitutional limits beyond which [Congress] may not go" in defining the elements of a crime, which had been addressed by this Court only a few years before Congress's 1980 amendment of section 841 to include drug quantities. *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Congress in amending section 841 should be presumed to have "legislate[d] in light of such constitutional limitations. *Harris*, 536 U.S. at 556. In *Mullaney*, this Court found unconstitutional a Maine statute under which Maine established a "single generic offense of felonious homicide" with "three distinct punishment categories," distinguished by the facts of intent or criminal recklessness. Under Maine law, "these facts of intent" were "not general elements of the crime" but "b[ore] only on the appropriate punishment category." 421 U.S. at 698-99. The result was that under the Maine statute, "once the State proved the elements which Maine required it to prove beyond a reasonable doubt the defendant faced 'a differential in sentencing ranging from a nominal fine to a mandatory life sentence.'" *McMillan v. Pennsylvania*, 477 U.S. 79, 87 (1986) (quoting *Mullaney*, 421 U.S. at 700; contrasting the provision of the Pennsylvania Mandatory Minimum Sentencing Act upheld in *McMillan* with the Maine statute invalidated in *Mullaney*). Congress in light of *Mullaney*'s strictures on "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment," 421 U.S. at 698, must be held to have intended the drug amounts specified in section 841 to be elements of the offense to be submitted to the jury and found beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mary Price
General Counsel
Families Against Mandatory Minimums Foundation
1612 K Street, N.W.
Suite 700
Washington, D.C. 20006
202-822-6700

David M. Porter
Co-chair, National Association of Criminal Defense Lawyers Amicus Committee
801 I Street, 3rd Floor
Sacramento, CA 95814
916-498-5700

Douglas W. Dunham
Counsel of Record
Ellen P. Quackenbos
Four Times Square
New York, NY 10036
212-735-3000

Carol Brook
President,
National Association of Federal Defenders
Federal Defender Program, Inc.
5 East Monroe Street
Suite 2800
Chicago, IL 60603
312-621-8300

David McColgin
Co-chair,
National Association of Federal Defenders
Amicus Committee
Defender Assoc. of Philadelphia, Fed. Ct. Div.
The Curtis Center
Suite 540W
Philadelphia, PA 19106
215-928-1100

Attorneys for Amici Curiae